16-408

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 92.

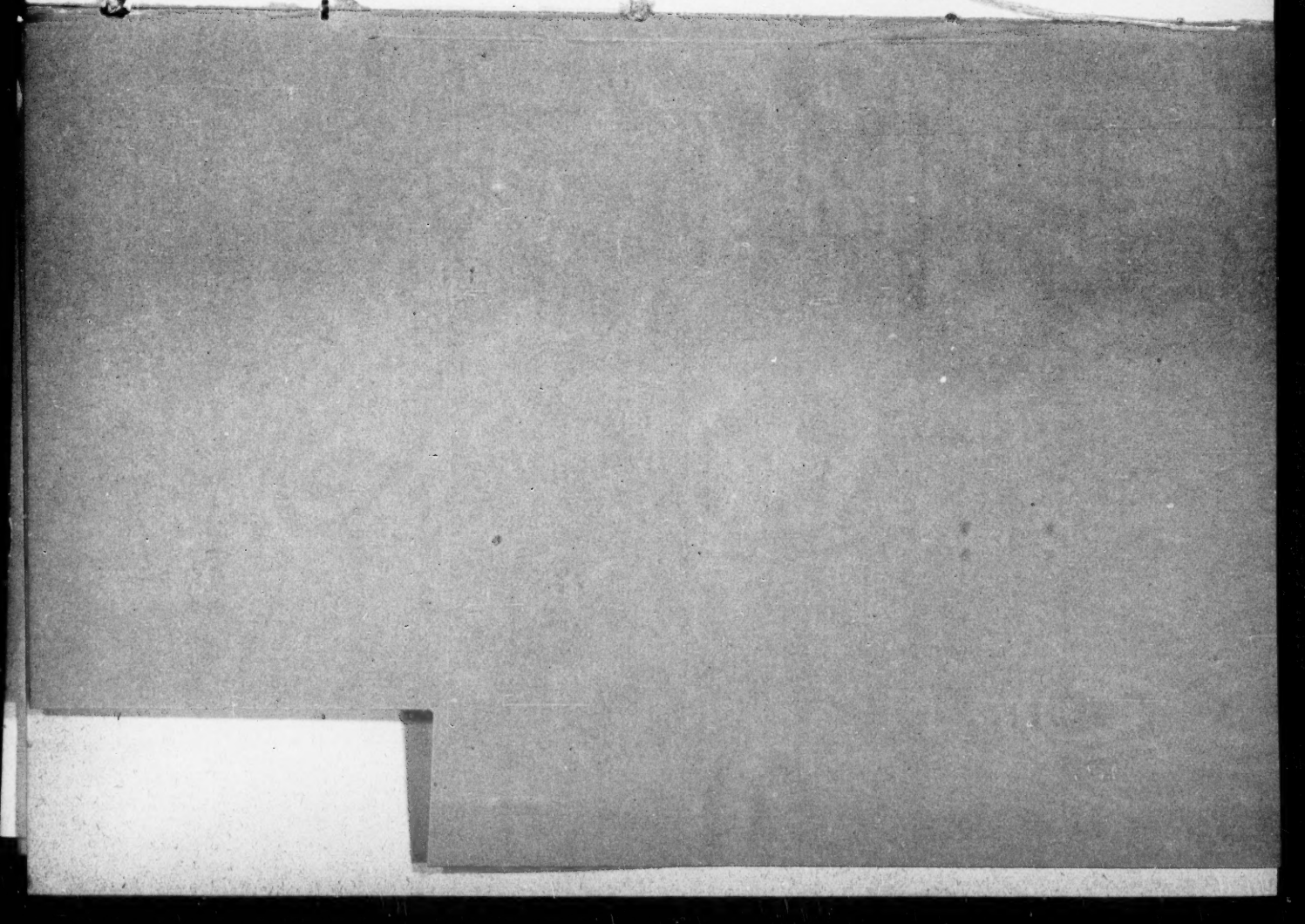
L. F. HODGES AND JAMES H. SMITH, PLAINTIFFS IN ERROR,

vs.

JAMES H. EASTON AND ALFRED E. BIGELOW.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

**FILED OCTOBER 17, 1879.**



# SUPREME COURT OF THE UNITED STATES.

## No. 92.

L. F. HODGES AND JAMES H. SMITH, PLAINTIFFS IN ERROR,

vs.

JAMES H. EASTON AND ALFRED E. BIGELOW.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

INDEX.


| | Original. | Print |
|---|---|---|
| Term heading, &c | 1 | 1 |
| Præcipe for summons | 2 | 1 |
| Complaint | 2 | 1 |
| Summons | 7 | 3 |
| Return to summons | 8 | 4 |
| Answer of defendants | 8 | 4 |
| Docket entries | 8 | 4 |
| Order suppressing parts of W. H. Valleau's deposition | 11 | 5 |
| Trial commenced | 12 | 6 |
| Verdict, special | 18 | 9 |
| Motion of plaintiff for judgment | 25 | 11 |
| Motion of defendants for a new trial | 26 | 12 |
| Hearing of above motions | 29 | 13 |
| Stipulation as to value of wheat, &c | 30 | 14 |
| Order overruling defendants' motion for a new trial and entering judgment for plaintiffs | 31 | 14 |
| Bond of defendants for supersedeas | 32 | 15 |
| Approval of same | 33 | 15 |
| Order for supersedeas | 35 | 16 |
| Remittitur of plaintiffs for $757.56 | 35 | 16 |
| Clerk's certificate | 36 | 16 |
| Writ of error | 37 | 17 |
| Citation and return | 38 | 17 |

1 Circuit court of the United States for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
*Eastern District of Wisconsin, ss:*

At a stated term of the circuit court of the United States for the eastern district of Wisconsin, begun and held according to law at the city of Milwaukee, on the first Monday (being the sixth day) of January, A. D. 1879. Present, the honorable Thomas Drummond, circuit judge, presiding, and the honorable Charles E. Dyer, district judge. Henry Fink, marshal; Edward Kurtz, clerk.

Among other the following proceedings were had, to wit:

JAMES H. EASTON & ALFRED E. BIGELOW, plaintiffs,
*vs.*
L. F. HODGES & JAMES H. SMITH, defendants.
} At law.

Be it remembered that heretofore, to wit, on the twenty-eighth day of October, 1876, came the plaintiffs by their attorneys, Messrs. Finches, Lynde & Miller, and filed their præcipe for a summons in an action for relief, and also filed their complaint to be served and bond for costs approved by the clerk, which præcipe is as follows:

2 *Præcipe for summons.*

Circuit court of the United States of America for the eastern district of Wisconsin.

JAMES H. EASTON & ALFRED E. BIGELOW, plaintiffs,
*vs.*
L. F. HODGES & JAMES H. SMITH, defendants.
} Action for relief.

Issue a summons in the above-entitled cause, with complaint to be served, returnable according to law.

FINCHES, LYNDE & MILLER,
*Plaintiffs' Attorneys.*

To EDWARD KURTZ, *Clerk.*

Which complaint is as follows:

*Complaint.*

United States circuit court, eastern district of Wisconsin.

JAMES H. EASTON & ALFRED E. BIGELOW
*against*
L. F. HODGES & JAMES H. SMITH.

Said plaintiffs, by Finches, Lynde & Miller, their attorneys, respectfully show and allege that at the time of the commencement of this suit they

were, and still are, citizens and residents of the State of Iowa and at the time of the transactions hereinafter stated were, and still are,
3 copartners in trade under the name, firm, and style of Easton & Bigelow.

And said plaintiffs allege that the said defendants, at the time of the commencement of this suit, were, and still are, citizens and residents of the State of Wisconsin, and at the time of the transactions hereinafter stated were, and still are, copartners in trade under the name, firm, and style of L. F. Hodges & Co.

And said plaintiffs allege that heretofore, to wit, in and during the months of April and May, 1876, the said plaintiffs were the owners of and lawfully entitled to the possession of ten thousand bushels of wheat, of the value of ten thousand dollars, then and there being in the possession of these plaintiffs in separate bins in the warehouse of one William H. Valleau, in Decorah, Iowa; that said Valleau, without the knowledge or consent of said plaintiffs, tortiously and wrongfully shipped said wheat to said defendants, in the city of Milwaukee, State of Wisconsin; that said defendants received said wheat from said Vallean, and wrongfully and tortiously sold said wheat, converted the same and the proceeds thereof to their own use.

And said plaintiffs allege that, prior to the commencement of this suit, they demanded the said wheat of said defendants; that said defendants refused to surrender up or to deliver to said plaintiffs
4 the said wheat, or any part of it.

And for a further and second cause of action said plaintiffs allege that heretofore, to wit, in and during the winter and spring of the year 1876, the First National Bank of Decorah, Iowa, then and still being a corporation created by and existing under the national banking law of the United States, and located and having its place of business in Decorah, in the State of Iowa, at Decorah, in said State of Iowa, discounted divers notes and drafts for and loaned money to one William H. Valleau, of said place, to wit, to the amount of ten thousand dollars, upon the security of the personal property hereinafter mentioned.

That said W. H. Valleau, as security for the repayment of the said discounts and loans, then and there delivered to said bank, and the said bank then received from said Valleau, a large quantity, to wit, ten thousand bushels of wheat, which wheat at the time it was so delivered was the property and in the possession of said Valleau, and then was stored in separate bins in a warehouse in Decorah, Iowa, and then was of great value, to wit, of the value ten thousand dollars; and said plaintiffs allege that the said wheat thereby became and was the property of said bank.

And said plaintiffs allege that the said Valleau, well knowing
5 the premises, and without repaying said loans and discounts, to wit, in the months of April and May, 1876, without the knowledge or consent of said bank, wrongfully and tortiously took and removed the said wheat from said warehouse and from the possession of said bank, and shipped the said wheat to the defendants in this suit, at the city of Milwaukee, Wisconsin, and the said defendants wrongfully and tortiously received and sold the said wheat, and wrongfully and tortiously converted the proceeds of such wheat to their own use.

And the said plaintiffs allege that neither the said Valleau or any other person for him has ever repaid to said bank said moneys so loaned and advanced, for the security of which said wheat was so delivered to said bank, or any part thereof.

And said plaintiffs allege that prior to the commencement of this

suit said bank demanded of said defendants the said wheat, and the said defendants refused and declined to deliver said wheat to said bank, and have not delivered the same to said bank.

And said plaintiffs allege that prior to the commencement of this suit said bank sold, assigned and transferred all of its right, title, and interest in and to said wheat, and all right of action to recover said
6 wheat or its value, to the said plaintiffs, and the said plaintiffs are now the lawful owners thereof, and of all right of action to recover said wheat or the proceeds thereof.

And said plaintiffs allege that prior to the commencement of this suit they notified said defendants of said assignment of said bank to them, said plaintiffs, of said wheat and of all right of action to recover the same or its value, and demanded said wheat of said defendants, and said defendants have refused and declined and still do refuse and decline to deliver the said wheat or any part thereof to said plaintiffs.

And said plaintiff alleges that at the time of the said assignment and at the time of the commencement of this suit, said plaintiffs were and still are citizens and residents of the State of Iowa, and said bank was organized under the banking laws of the United States and located at Decorah, in said State of Iowa, and said defendants at the same time were and still are citizens and residents of the State of Wisconsin and copartners under the name, firm, and style of L. F. Hodges & Co.

And said plaintiffs allege that by reason of the premises they have sustained damages for the conversion of said wheat by said defendants to the amount of twenty thousand dollars.

Wherefore said plaintiffs demand judgment for said conversion
7 of said wheat in said two causes of action herein set forth to the amount of twenty thousand dollars and the costs of this action.

FINCHES, LYNDE & MILLER,
*Pl'ffs' Att'ys.*

Whereupon a summons issued, returnable according to law, with said complaint annexed, as follows:

*Summons.*

Circuit court of the United States for the eastern district of Wisconsin.

JAMES H. EASTON & ALFRED E. BIGELOW, plaintiffs,
*vs.*
L. F. HODGES & JAMES H. SMITH, DEFENDants. } Complaint served.

*Summons for relief.*

The President of the United States of America to the above-named defendants:

You are hereby summoned and required to answer the complaint of the plaintiffs in this action, which is filed in the office of the clerk of this court, at Milwaukee, in said district, and a copy of which is herewith served upon you, and you are also required to file your answer thereto in said clerk's office, at Milwaukee, and to serve a copy thereof on the attorneys of the plaintiffs, whose names are subscribed hereto, at their office, in Milwaukee, Wis., within twenty days after the service of

this summons on you, exclusive of the day of such service, and if you fail to answer the complaint as aforesaid, the plaintiffs will apply to the court for the relief demanded in the complaint.

The marshal of said district is hereby commanded to serve this summons and make due return thereto.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said eastern district of Wisconsin, this 28th day of October, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the 101st.

[SEAL.] EDWARD KURTZ, *Clerk.*

FINCHES, LYNDE & MILLER,
*Attorneys.*

8 *Return.*

Summons & complaint returned: "Served on the within-named L. F. Hodges and James A. Smith by delivering to them each personally a copy of this summons and complaint, this 31st day of October, A. D. 1876.

"C. S. HAMILTON,
"*Marshal.*"

Fees, $4.66.

NOVEMBER 29, 1876.

This day came the defendants, by their attorney, Mr. DeWitt Davis, and filed their answer, as follows:

*Answer.*

United States circuit court, eastern district of Wisconsin.

JAMES H. EASTON AND ALFRED E. BIGELOW, plaintiffs,
*against*
L. F. HODGES & JAMES H. SMITH, DEFENDANTS.

And now come the above-named defendants, by DeWitt Davis, their attorney, and for answer to the complaint of the plaintiffs herein, deny each and every allegation, statement, matter, fact, and thing in said complaint set forth, alleged, and contained.

DEWITT DAVIS,
*Defendants' Att'y.*

*Docket entries.*

NOVEMBER 29, 1876.

9 Upon the summons and complaint of the plaintiffs and the answer of the defendants in this action, and the papers on file therein, and on the affidavit of James H. Smith, one of said defendants, and on motion of DeWitt Davis, attorney for said defendants, it is hereby ordered that said plaintiffs show cause before me, at the court-room of said court, on the 4th day of December, A. D. 1876, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can

be heard, why the proceedings for the examination of said defendants as witnesses in said cause, and the production of certain letters and writings referred to in said affidavit, should not be vacated and set aside, and why said defendants should not be relieved from obeying the subpœna and notice referred to in said affidavit, or attending upon such examination. And it is hereby further ordered that all the proceedings for the examination of said defendants, or either of them, or the production of any papers, writings, or documents, based upon the subpœna and notice hereinbefore referred to, be, and the same are hereby, stayed until the hearing and final disposition of the motion upon the foregoing order to show cause; and that a copy of this order be forthwith served on the plaintiffs' attorneys herein.

(Signed) CHAS. E. DYER, *Judge.*

DECEMBER 4, 1876.

This day came the parties by their counsel, and by consent it
10 is ordered by the court that the hearing of the order to show cause why the proceedings for the examination of the defendants as witnesses should not be vacated be continued to Saturday, the ninth day of December instant.

JANUARY 13, 1877.

This day came the parties by their counsel, and the motion of the defendants to set aside the subpœna and proceedings for the examination of the defendants as witnesses before trial on behalf of the plaintiffs, having heretofore been argued by the said counsel, and the court being now sufficiently advised, it is ordered by the court that said subpœna and proceedings be, and hereby are, set aside and vacated as unauthorized by law.

MAY 17, 1877.

Deposition of W. H. Valleau received from post-office and filed.

AUGUST 3, 1877.

Deposition received from F. Bloodgood, U. S. com'r, and filed.

OCTOBER 3, 1877.

Depositions received from post-office and filed.

OCTOBER 8, 1877.

This day came the parties by their counsel, and upon application
11 of the defendants and affidavit filed herein on the 3d instant, it is ordered by the court that this cause be, and hereby is, continued.

JANUARY 22, 1878.

This day came the defendants by their counsel, Mr. Davis, and moved the court to suppress the deposition of W. H. Valleau, taken herein on the part of the plaintiffs. And said motion being argued by counsel and concluded, the court held the same under consideration.

*Order suppressing certain parts of W. H. Valleau's dep'n.*

JANUARY 28, 1878.

The motion of the defendants for the suppression of the deposition of William A. Valleau, taken in the above-entitled cause, having been

argued by counsel for the respective parties, and having been considered by the court, it is hereby ordered that such part of said deposition as relates to the letters purporting to have been written by said defendants or either of them to the said witness, W. H. Valleau, and exhibited to him by the counsel for the plaintiffs at the examination of said witness, be, and the same is hereby, suppressed on the ground that said letters were not produced and exhibited to the defendants' counsel, as demanded, on said examination.

MAY 11, 1878.

This day came the parties, by their counsel, and upon the motion of the defendants for a continuance of this cause, and affidavits
12 filed, it is ordered by the court that this cause be, and hereby is, continued to the October term, the defendants to pay any costs incurred by the plaintiffs at this term.

And afterwards, to wit, at a stated term of said court begun and held according to law, at the city of Milwaukee, on the first Monday (being the seventh day) of October, A. D. 1878; present, the honorable Charles E. Dyer, district judge, presiding. On the twenty-third day of said term, to wit, on the eleventh day of November, A. D. 1878, the following proceedings were had, to wit:

*Trial.*

JAMES H. EASTON & ALFRED E. BIGELOW, plaintiffs, *vs.* L. F. HODGES & JAMES H. SMITH, defendants. } At law.

This day came the parties by their counsel, Messrs. H. M. Finch and W. P. Lynde appearing for the plaintiffs,' and Messrs. A. R. R. Butler and DeWitt Davis appearing for the defendants, and the issue herein came on to be tried. Whereupon a jury was called to try the same, who came, to wit: Courtland Bones, William Shallock, L. D.
13 Osgood, Peter McKenzie, John Martin, John G. White, A. L. Clasan, Charles Barrows, W. B. Stetson, John S. Hart, Warren Langley, and George Perkins, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled, and the trial not being concluded, the same was adjourned until to morrow morning.

And afterwards, to wit, on the twenty-fourth day of said term, to wit, on the 12th day of November, A. D. 1878, the following proceedings were had, to wit:

This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow afternoon.

And afterwards, to wit, on the twenty-fifth day of said term, to wit, on the 13th day of November, A. D. 1878, the following proceedings were had, to wit:

This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the twenty-sixth day of said term, to wit, on the 14th day of November, A. D. 1878, the following proceedings were had, to wit:

This day came the parties by their counsel, and the trial of the
14 issue herein was resumed, and not being conclued, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the twenty-seventh day of said term, to wit, on the fifteenth day of November, A. D. 1878, the following proceedings were had, to wit:

This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the twenty-eighth day of said term, to wit, on the sixteenth day of November, A. D. 1878, the following proceedings were had, to wit:

This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until Monday morning next.

And afterwards, to wit, on the twenty-ninth day of said term, to wit, on the eighteenth day of November, A. D. 1878, the following proceedings were had, to wit:

This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

15 And afterwards, to wit, on the thirtieth day of said term, to wit, on the nineteenth day of November, A. D. 1878, the following proceedings were had, to wit:

This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the thirty-first day of said term, to wit, on the twentieth day of November, A. D. 1878, the following proceedings were had, to wit:

This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the thirty-second day of said term, to wit, on the twenty-first day of November, A. D. 1878, the following proceedings were had, to wit:

This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the thirty-third day of said term, to wit, on the twenty-second day of November, A. D. 1878, the following proceedings were had, to wit:

This day came the parties by their counsel, and the trial of the
16 issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the thirty-fourth day of said term, to wit, on the twenty-third day of November, A. D. 1878, the following proceedings were had, to wit:

This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until Monday afternoon next.

And afterwards, to wit, on the thirty-fifth day of said term, to wit, on the twenty-fifth day of November, A. D. 1878, the following proceedings were had, to wit:

This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the thirty-six day of said term, to wit, on the twenty-sixth day of November, A. D. 1878, the following proceedings were had, to wit:

This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

17 And afterwards, to wit, on the thirty-seventh day of said term, to wit, on the twenty-seventh day of November, A. D. 1878, the following proceedings were had, to wit:

This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until Friday morning next.

And afterwards, to wit, on the thirty-eighth day of said term, to wit, on the twenty-ninth day of November, A. D. 1878, the following proceedings were had, to wit:

This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the thirty-ninth day of said term, to wit, on the thirtieth day of November, A. D. 1878, the following proceedings were had, to wit:

This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until Monday morning next.

And afterwards, to wit, on the fortieth day of said term, to wit, on the second day of December, A. D. 1878, the following proceedings were had, to wit:

18 This day came the parties by their counsel, and the trial of the issue herein was resumed, and not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the forty-first day of said term, to wit, on the third day of December, A. D. 1878, the following proceedings were had, to wit:

This day came the parties by their counsel, and the trial of the issue herein was resumed, and the jurors of the jury aforesaid being charged by the court, retired to their room, under the charge of a sworn officer,

to deliberate upon their verdict, and with leave to bring in a sealed verdict to-morrow morning.

And afterwards, to wit, on the forty-second day of said term, to wit, on the fourth day of December, A. D. 1878, the following proceedings were had, to wit:

*Special verdict.*

This day came the parties by their counsel, and the jurors of the jury aforesaid came into court and rendered a special verdict in answer to the questions propounded by the court, and say as follows:

Question 1st. Did the First National Bank of Decorah loan to J. H. Baker $3,000 on or about the 31st day of January, 1876, and take as security for the repayment thereof special bin receipts for 4,000 bushels of No. 1 wheat in Valleau's elevator in Decorah?—Answer. Yes.

Question 2nd. Did Easton & Bigelow loan to Wm. H. Valleau,
19 on February 11, 1876, $3,000, and take as security for the repayment thereof special bin receipts for 4,000 bushels of No. 1 wheat in Valleau's elevator in Decorah?—Answer. Yes.

Question 3rd. Did the First National Bank of Decorah loan to J. H. Baker $1,300 on the 16th day of February, 1876, and take as security for the repayment thereof special bin receipts for 2,000 bushels of No. 1 wheat in Valleau's elevator?—Answer. Yes.

Question 4th. Did the First National Bank of Decorah loan to J. H. Baker, on the 19th day of February, 1876, $1,000, and take as security for the repayment thereof special bin receipts for 1,500 bushels of No. 1 wheat stored in Valleau's elevator?—Answer. Yes.

Question 5th. If you answer the foregoing questions in the affirmative, then did all the bins named on the face of the receipts issued by W. H. Valleau to the First National Bank of Decorah and to the plaintiffs, Easton & Bigelow, at the time they took said receipts, contain the full quantity of wheat called for by the receipts?—Answer. No.

Question 6th. If the bins or any of them did not, at that time, contain all the wheat called for by said receipts, were they thereafter filled with the required quantity of No. 1 wheat?—Answer. Yes.

Question 7th. If the bins named on the receipts delivered to the bank did not contain the quantity of wheat called for by said re-
20 ceipts when the receipts were given, was it then agreed between W. H. Valleau and the bank that such bins should be filled with wheat after the acceptance of the receipts by the bank?—Answer. Yes.

Question 8th. If the bins named on the receipt delivered to Easton & Bigelow, or any of them, did not contain the quantity called for by said receipts when the receipts were given, was it then agreed between Valleau and said Easton & Bigelow that such bins should be filled with wheat after the acceptance of the receipts by them?—Answer. Yes.

Question 9th. Did Valleau, on the 6th day of May, 1876, call upon the cashier of the bank, and represent or lead said cashier to believe that he was authorized to draw on Hodges & Co. for $10,000, and that such drafts would be paid?—Answer. Yes.

Question 10th. If you answer the last preceding question in the affirmative, then did the cashier of the bank rely upon such representation of Valleau, and did he, believing it to be true, receive the drafts and surrender the warehouse receipts to Valleau?—Answer. Yes.

Question 11th. If such a transaction was had between the cashier of the bank and Valleau, as is mentioned in the last two preceding ques-

tions, was it a transaction in good faith on the part of Valleau,
21 or was it fraudulent on his part?—Answer. Fraudulent.

Question 12th. Did the bank and the plaintiffs, on the 6th day of May, 1876, receive the checks in evidence from Valleau in actual payment of the notes of himself and Baker, relying on Valleau's responsibility; and upon the faith of such responsibility did they surrender the notes and warehouse receipts?—Answer. No.

Question 13th. Were the said drafts for $5,000 each paid by Hodges & Co.?—Answer. No.

Question 14th. Did Valleau, at any time subsequent to the delivery of the elevator receipts in question, ship the wheat covered by said receipts to Hodges & Co.; and, if he did, what was the quantity of said wheat so shipped?—Answer. Yes; 11,500 bushels.

Question 15th. If you answer the last foregoing question in the affirmative, was such shipment of said wheat made by Valleau in good faith, or was it made with intent to defraud the bank and the plaintiffs?—Answer. With intent to defraud the bank and plaintiffs.

Question 16th. Was all or the greater part of the wheat covered by the receipts in question shipped out of the elevator before the 6th day of May, 1876?—Answer. Yes.

Question 17th. Did Hodges & Co. receive from Valleau the
22 wheat covered by said receipts, or any part of it, and sell the same and apply the proceeds to the credit of Valleau's account with them? If so, state the quanity of said wheat so received, sold, and applied.—Answer. Yes; 11,500 bushels.

Question 18th. Did the plaintiffs and the bank, or either of them, verbally consent, prior to the 6th day of May, 1876, that the wheat on which they held warehouse receipts, or any part of it, might be shipped by William H. Valleau?—Answer. No.

Question 19th. If you say such consent was given, then was it, or not, given to ship the same solely for the purpose of paying J. H. Baker's notes?

Question 20th. Was the wheat covered by the receipts in question, at the time of or at any time before its shipment, mixed with other wheat in the elevator?—Answer. Yes.

Question 21st. If it was, was it so mixed with the knowledge or consent of the plaintiff or the officer of the bank?—Answer. No.

Question 22nd. If the wheat in question was mixed with other wheat in the elevator, was such mixture intentional, and was it made by any person in charge of the elevator and acting on behalf of Valleau?—Answer. Yes.

Question 23rd. If you say that the wheat covered by said receipts was mixed with other wheat in the elevator, did the defendants
23 have knowledge thereof?—Answer. No.

Question 24th. Was wheat of grade No. 1 shipped from the elevator to and received by Hodges & Co.? And, if so, what was the total quantity of such wheat received by them subsequent to January 31, 1876?—Answer. Yes; 19,488$\frac{3}{6}$$\frac{0}{0}$ bushels.

Question 24½. How much No. 1 wheat was shipped from the Decorah elevator to other parties than the defendants during the same period?—Answer. 7,622$\frac{4}{6}$$\frac{0}{0}$ bushels.

Question 25th. Did Hodges & Co., the defendants, after January 31, 1876, make general advances of money to William H. Valleau, in the course of their business, on the credit of wheat shipped to them from his elevators in Decorah and at other places? If so, was the amount

of such advances equivalent to the value of the wheat so shipped?—Answer. Yes.

Question 26th. Did Hodges & Co. make any specific advances on shipments to them of any of the wheat covered by said receipts, if any such shipments were made? If so, what was the amount of such advances?—Answer. No.

Question 27th. Did the defendants make a final settlement with Valleau on the 26th day of September, 1876, whereby Valleau was credited with the full value of all the wheat received from him, and was released from the balance of Hodges & Co.' account against him?—Answer. Yes.

24 Question 28th. If you answer the last preceding question in the affirmative, did Hodges & Co., at the time of such settlement, know of the pendency of the action commenced by the bank in Winneshiek Co., Iowa, against Valleau on the drafts?—Answer. Yes.

Question 29th. Did the defendants have any notice or knowledge that the wheat received by them from Valleau's elevator in Decorah was covered by receipts held by the plaintiffs and the bank?—Answer. Yes.

Question 30th. If in answer to the 11th question you have stated that the transaction between the cashier of the bank and Valleau on the 6th day of May, 1876, was fraudulent on the part of Valleau, had the defendants at any time during the shipment of said wheat any notice or knowledge of said fraud?—Answer. Yes.

Question 31st. If, in answer to the 14th and 15th questions, you have answered that the wheat in question, or any part of it was shipped to Hodges & Co., and that such shipment was fraudulent on the part of Valleau, were the defendants parties to such fraud?—Answer. Yes.

Question 32nd. If you answer the last foregoing question in the affirmative, when did the bank and the plaintiffs obtain full knowl-

25 edge that the defendants were parties to such fraud?—Answer. April 25, 1877.

Question 33rd. When did the officers of the bank and the plaintiff's first have knowledge that the wheat covered by the receipts had been shipped out of the elevator?—Answer. On or about the 15th day of May, 1876.

Question 34th. If said wheat, or any part of it was shipped to or received by Hodges & Co., when did the bank officers and the plaintiffs first have knowledge or information of that fact?—Answer. Sept. 27, 1876.

J. S. HART,
*Foreman.*

And afterwards, to wit, on the forty-fifth day of said term, to wit, on the seventh day of December, A. D. 1878, the following proceedings were had, to wit:

*Motion of plaintiff for judgment.*

This day came the plaintiffs by their counsel and moved the court for judgment upon the special verdict of the jury, for the value of the wheat wrongfully converted by the defendants, or such damages as the court shall adjudge. Which motion is as follows, to wit:

U. S. circuit court, eastern district of Wisconsin.

JAMES H. EASTON ET ALS.
*vs.*
L. F. HODGES ET ALS.

26 And now come the said plaintiffs, by Finches, Lynde & Miller, their att'ys, and move the court now here for judgment upon the special verdict of the jury, for the value of the wheat wrongfully converted by the defendants, or such damages as the court shall adjudge, and for such other or further relief as the court may or can grant in the premises.

Dec. 7, 1878.

FINCHES, LYNDE & MILLER,
*Pl'ffs' Att'ys.*

And afterwards, to wit, on the forty-eighth day of said term, to wit, on the 11th day of December, A. D. 1878, the following proceedings were had, to wit:

*Motion of def'ts to set aside verdict & for a new trial.*

This day came the defendants by their counsel, and moved the court to vacate and set aside the special verdict of the jury, and for a new trial, for reasons filed, as follows:

United States circuit court, eastern district of Wisconsin.

JAMES H. EASTON ET AL.
*against*
L. F. HODGES ET AL.

And now come the defendants in the above-entitled cause, by DeWitt Davis, their attorney, and here move the court for an order vacating and setting aside the special verdict of the jury herein, and for a new trial, on the following grounds:

27 First. Because the answer of the jury to the following questions, numbered respectively 12th, 14th, 15th, 17th, 18th, 24½th, 29th, 30th, 31st, 32nd, 33rd, & 34th, in said special verdict are and each of them is contrary to the evidence.

Second. Because the said special verdict, and each and every part thereof, is contrary to the law and the evidence and against the charge and instructions of the court.

Third. Because said special verdict is inconsistent, evasive, and inexplicit, and contains findings of facts not put in issue by the pleadings.

Fourth. Because said special verdict is irregular and insufficient, and does not contain findings upon all of the material issues in the case.

Fifth. Because the court erred in permitting the witness, Burdick, to read certain parts of the deposition of William H. Valleau to the jury against the objection of the defendants, while said witness, Valleau, was present in court.

Sixth. Because the court erred in permitting the plaintiffs to offer any evidence under the second count or cause of action in said plaintiff's complaint, contrary to the objection of the defendants.

Seventh. Because the court erred in not directing a verdict for the defendants, as asked for by said defendants, on the ground that the plaintiffs and the bank had elected to affirm the contract by
28 prosecuting the attachment suit on the drafts, and dealing with the subject-matter of the contract, and taking no steps to rescind the contract for several months after the discovery of the alleged fraud by which the warehouse receipts were given up.

Eighth. Because the court erred in not directing a verdict for the defendants, asked for by them, on the ground that the bank and plaintiff,s with full knowledge of the alleged fraud, made a compromise and settlement with Valleau in the attachment suit, for a valid consideration, and released him from all claim or liability upon the drafts sued upon in the attachment suit, and for all claim or liability for damages for the alleged conversion of the wheat in controversy.

Dec. 11, 1878.

DE WITT DAVIS,
*Pl'ffs' Att'y.*

And afterwards, to wit, on the sixty-first day of said term, to wit, on the fourth day of January, A. D. 1879, the following proceedings were had, to wit:

This day came the parties, by their counsel, and by consent it is ordered by the court that the motions of the plaintiffs for judgment upon the special verdict of the jury, and of the defendants for a new trial, be continued until the January term.

29 And now, at this same term, to wit, January term, 1879, and on the seventy-third day thereof, to wit, on the fourteenth day of April, A. D. 1879, present the circuit and district judges aforesaid, the following proceedings were had, to wit:

*Hearing of motions of both parties.*

JAMES H. EASTON & ALFRED E. BIGELOW
*vs.*
L. F. HODGES & JAMES H. SMITH. } At law.

This day came the parties by their counsel, and the motions of the plaintiffs for judgment upon the special verdict of the jury and of the defendants for a new trial came on to be heard, and were argued by Mr. H. M. Finch for the plaintiffs, and by Messrs. De Witt Davis and A. R. R. Butler for the defendants, and the hearing not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the seventy-fourth day of said term, to wit, on the fifteenth day of April, A. D. 1879, present the circuit and district judges aforesaid, the following proceedings were had, to wit:

This day came the parties, by their counsel, and the hearing of the motions of the plaintiffs for judgment upon the special verdict of the jury, and of the defendants for a new trial was resumed, and not being concluded, the same was adjourned until to-morrow morning.

30 And afterwards, to wit, on the seventy-fifth day of said term, to wit, on the sixteenth day of April, A. D. 1879, present the circuit and district judges aforesaid, the following proceedings were had, to wit:

This day came the parties by their counsel, and the hearing of the

motions of the plaintiffs for judgment upon the special verdict of the jury and of the defendants for a new trial was resumed, and being concluded, the court held the same under consideration.

April 24, 1879. Stipulation as to the amount of freight and value of wheat filed, as follows:

*Stipulation as to value of wheat, &c.*

U. S. circuit court, eastern dist. Wis.

JAMES H. EASTON ET ALS.
*vs.*
L. F. HODGES & CO.

It is stipulated for the purposes of the trial that the rate of freight on No. 1 wheat from Decorah, Iowa, to Milwaukee during April and May, 1876, was $18\frac{6}{10}$ cts. per bushel, and that deducting that rate of freight from $1.09 per bushel at Milwaukee, at said date, making ninety and four-tenths ($90\frac{4}{10}$) cents, is the value of No. 1 wheat per bushel at Decorah on the 6th day of May, 1876.

FINCHES, LYNDE & MILLER,
*Pl'ffs' Att'ys.*

31 DE WITT DAVIS, *Def'ts' Att'y.*

And afterwards, to wit, on the eighty-second day of said term, to wit, on the twenty-fourth day of April, A. D. 1879, present the circuit and district judges aforesaid, the following proceedings were had, to wit:

*Order overruling def'ts' motion for a new trial, and entering judgment for the plaintiffs.*

JAMES H. EASTON & ALFRED E. BIGELOW
*vs.*
L. F. HODGES & JAMES H. SMITH. } At law.

This day came the parties by their counsel, and on consideration of the motion of the plaintiffs for judgment upon the special verdict of the jury and of the defendants for a new trial, and the arguments of counsel thereon, it is ordered by the court that the motion of the defendants for a new trial be, and hereby is, overruled, and that the motion of the plaintiffs for judgment upon the special verdict of the jury, and facts conceded or not disputed upon the trial, be, and hereby is, granted. And the court doth assess the damages to the said plaintiffs at the sum of twelve thousand five hundred and fifty-four dollars and eighty-nine cents.

31½ Whereupon it is considered and adjudged by this court now here that the said plaintiffs do have and recover of the said defendants, L. F. Hodges and James H. Smith, the said sum of twelve thousand five hundred and fifty-four dollars and eighty-nine cents, together with two hundred and seventy-one dollars and thirty-five cents, their costs about their said suit in this behalf by them expended, and that they have execution therefor.

Judgment-roll signed April 24th, A. D. 1879.

Damages, $12,554.89; costs, $271.35—$12,826.24.

EDWARD KURTZ, *Clerk.*

32 MAY 1, 1879.

This day came the defendants and filed their bond, with Joseph M. Allcott and Calvin E. Lewis as sureties, in the penalty of sixteen thousand dollars, conditioned that the said defendants shall prosecute a writ of error to effect, and answer all damages and costs if they fail to make their plea good, which bond is approved by the district judge, and is as follows:

*Bond for supersedeas.*

Know all men by these presents that we, Lyman F. Hodges and James H. Smith, principals, and J. M. Allcott and Calvin E. Lewis, as sureties, are held and firmly bound unto James H. Easton and Alfred E. Bigelow in the full and just sum of sixteen thousand dollars, to be paid to the said James H. Easton and Alfred E. Bigelow, or their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 1st day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas, lately at a term of the circuit court of the United States for the eastern district of Wisconsin, in a suit depending in said court between the said James H. Easton and Alfred E. Bigelow, plaintiffs, and Lyman F. Hodges and James H. Smith, defendants, a judg-
33 ment for the sum of twelve thousand five hundred and fifty-four dollars and eighty-nine cents damages, with costs, was rendered against the said Lyman F. Hodges and James H. Smith, defendants; and the said Lyman F. Hodges and James H. Smith, defendants, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the said judgment in the aforesaid suit, and a citation directed to the said James H. Easton and Alfred E. Bigelow citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now, the condition of the above obligation is such that if the said Lyman F. Hodges and James H. Smith shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else, to remain in full force and virtue.

LYMAN F. HODGES. [L. S.]
JAS. H. SMITH. [L. S.]
J. M. ALLCOTT. [L. S.]
CALVIN E. LEWIS. [L. S.]

Sealed and delivered in presence of—
JOHN R. RIESS.

Approved by—

CHAS. E. DYER, *Judge.*

34 EASTERN DISTRICT OF WISCONSIN, *ss:*

Calvin E. Lewis, being duly sworn, says that he is a resident and freeholder in said district, and resides at No. 1600 Grand ave., in the city of Milwaukee, and that he is worth the sum of twenty-five thousand dollars and upwards, over and above his debts and liabilities, in property in said district, not by law exempt from execution.

CALVIN E. LEWIS.

Subscribed and sworn to before me this 28th day of April, A. D. 1879.

[SEAL.] JOHN R. RIESS,
*Notary Public, Mil. Co., Wis.*

EASTERN DISTRICT OF WISCONSIN, *ss:*

Joseph M. Allcott, being duly sworn, says that he is a resident and freeholder in said district, and resides at No. 90 Wisconsin street, in the city of Milwaukee, and that he is worth the sum of twenty thousand dollars and upwards, over and above his debts and liabilities, in property in said district, not by law exempt from execution.

JOSEPH M. ALLCOTT.

Subscribed and sworn to before me this 28th day of April, A. D. 1879.

[SEAL.] JOHN R. RIESS,
*Notary Public, Mil. Co., Wis.*

35 *Order for supersedeas.*

Whereupon, it is ordered by the court that execution be superseded, and a writ of error and citation issued, and a copy of said writ of error lodged for the defendants in error.

And afterwards, to wit, on the eighty-ninth day of said term, to wit, on the eleventh day of June, A. D. 1879, the following proceedings were had, to wit:

*Remittitur.*

This day came the plaintiffs, by their attorneys, and remitted the sum of seven hundred and fifty-seven dollars and fifty-six cents on this judgment, as of April 24, 1879, as follows:

United States circuit court, eastern district of Wisconsin.

JAMES H. EASTON ET AL.
*vs.*
L. F. HODGES ET AL.

And now come the said plaintiffs, by Finches, Lynde & Miller, their attorneys, and here in open court remit from the judgment heretofore docketed in this cause the amount of seven hundred and fifty-seven dollars and fifty-six cents ($757.56), and said judgment to stand as docketed less the said sum of seven hundred and fifty-seven dollars and fifty-six cents.

Dated June 11, 1879.

FINCHES, LYNDE & MILLER,
*Att'ys for Pl'ffs.*

36 UNITED STATES OF AMERICA,
*Eastern District of Wisconsin, ss:*

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their origi-

nals now on file and remaining of record in my office, and that they are true copies of such originals, and correct transcripts therefrom, being a full and complete transcript of the record in the case of James H. Easton et al. vs. L. F. Hodges et al.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this sixth day of October, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 104th.

[SEAL.] EDWARD KURTZ, *Clerk.*

37 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States of America, for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between James H. Easton and Alfred E. Bigelow, plaintiffs, and L. F. Hodges and James H. Smith, defendants, a manifest error hath happened to the great damage of the said L. F. Hodges and James H. Smith, as by the complainant appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, that of right and according to law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this first day of May, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 103rd.

EDWARD KURTZ,
*Clerk U. S. Circuit Court East'n Dist. of Wisconsin.*

38 UNITED STATES OF AMERICA, *ss:*

[SEAL.] To James H. Easton and Alfred E. Bigelow, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein L. F. Hodges and James H. Smith are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee, in

said district, this first day of May, A. D. 1879, and of the Independence of the United States the 103rd.

CHAS. E. DYER, *Judge.*

We admit service of a copy of the above citation this 1st day of May, A. D. 1879.

FINCHES, LYNDE & MILLER,
*Att'ys of Def'ts in Error.*

(Indorsement on cover:) No. 92. L. F. Hodges and James H. Smith, plaintiffs in error., vs. James H. Easton and Alfred E. Bigelow. E. Wisconson C. C. U. S. Filed 11th October, 1879.

16408

IN THE

# SUPREME COURT

OF THE

# UNITED STATES.

L. F. HODGES AND JAMES H. SMITH, *Plaintiffs in Error,*

*vs.*

JAMES H. EASTON AND ALFRED E. BIGELOW, *Defendants in Error.*

---

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

L. S. DIXON,
*Of Counsel for Plaintiffs in Error.*

IN THE

# SUPREME COURT

OF THE

# UNITED STATES.

L. F. HODGES AND JAMES H. SMITH, *Plaintiffs in Error,*

*vs.*

JAMES H. EASTON AND ALFRED E. BIGELOW, *Defendants in Error.*

## BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

### STATEMENT.

The action below would have been trover at the common law, instituted by the defendants in error against the plaintiffs in error to recover the value of 20,000 bushels of wheat, alleged to have been the property of the plaintiffs, and to have been wrongfully converted by the defendants in the action. The issues joined were much the same as those formed by the general issue at

the common law. The complaint was in two counts, in the first of which the plaintiffs alleged, that, in the months of April and May, 1876, they were the owners, and lawfully entitled to the possession of 10,000 bushels of wheat, of the value of $10,000, then and there being in their possession, in separate bins, in the warehouse of one Valleau, in Decorah, in the state of Iowa; that Valleau, without their knowledge or consent, tortiously and wrongfully shipped the wheat to the defendants in the city of Milwaukee, in the state of Wisconsin, where the defendants received the same from Valleau, and tortiously and wrongfully sold the same, and converted the same and the proceeds to their own use; and that, prior to the commencement of the action, the plaintiffs demanded the wheat of the defendants, who refused to surrender or deliver the same, or any part thereof, to the plaintiffs.

The second count alleged, that, in and during the winter and spring of 1876, the First National Bank of Decorah, in the state of Iowa, located and doing business at the same place, discounted divers notes and drafts for, and loaned money to, said Valleau, at that place, to the amount of $10,000, upon the security of the personal property thereinafter mentioned; that Valleau, as security for the repayment of such discounts and loans, then and there delivered to the bank, and the bank received, a large quantity, to wit: 10,000 bushels of wheat, of the value of $10,000, the property of, and in the possession of, said Valleau, and then stored in separate bins in a warehouse in said Decorah, and which wheat thereby became the property of the bank; that Valleau, well knowing the premises, and without repaying said loans and discounts, in the months of April and May, 1876, without the knowledge or consent of the bank, wrongfully and tortiously took and removed the wheat from the warehouse,

and from the possession of the bank, and shipped it to the defendants, at the city of Milwaukee, Wisconsin, and the defendants wrongfully and tortiously received and sold the same, and converted the proceeds thereof to their own use; that neither Valleau, nor any person for him, had repaid the bank the moneys so loaned and advanced, and for the security of which the wheat was so delivered; that, prior to the commencement of the action, the bank had demanded the wheat of the defendants, who refused to deliver the same to the bank; that, prior to the commencement of the action, the bank sold, assigned and transferred all of its right, title and interest in and to the wheat, and all right of action to recover the same, or its value, to the plaintiffs, who were the owners thereof, and of all right of action to recover the wheat, or the proceeds thereof; and that, prior to the commencement of the action, the plaintiffs notified the defendants of such assignment, and demanded the wheat of the defendants, and the defendants refused to deliver the same, or any part thereof, to the plaintiffs, and still so refused.

The answer was a general denial under the code of Wisconsin, and traversed and put in issue every allegation, statement, matter of fact and thing set forth and alleged in the complaint.

The trial was by jury, who, instead of returning a verdict, either general or special, in any form known to the law or practice, brought into court their answers, in writing, to thirty-four special written interrogatories which were propounded to them, and which will be found on pages 9, 10 and 11 of the printed record. The questions so submitted to, and answers so given by the jury, are denominated *special verdict* in the record, and it is one of the principal objects of the writ of error here sued out, to bring the record before this court, in order that it may be authoritatively determined whether such questions and

answers constitute or can be received and acted upon as a special verdict, and if they can, whether the facts found by them were sufficient to enable the court to render judgment against the defendants in the action, as shown by the record. The case comes here upon the record alone, no bill of exceptions having been settled, and none being necessary to present the questions involved.

Omitting the introductory or formal part of a special verdict, as known in practice, and reducing the questions and answers to narrative form, the special verdict in question would read as follows:

That the First National Bank of Decorah loaned to J. H. Baker $3,000, on or about the 31st day of January, 1876, and took as security for the repayment thereof, special bin receipts for 4,000 bushels of No. 1 wheat in Valleau's elevator, in Decorah.

That Easton & Bigelow loaned to Wm. H. Valleau, on February 11, 1876, $3,000, and took as security for the repayment thereof, special bin receipts for 4,000 bushels of No. 1 wheat in Valleau's elevator in Decorah.

That the First National Bank of Decorah loaned to J. H. Baker, on the 16th day of February, 1876, $1,300, and took as security for the repayment thereof, special bin receipts for 2,000 bushels of No. 1 wheat in Valleau's elevator.

That the First National Bank of Decorah loaned to J. H. Baker, on the 19th day of February, 1876, $1,000, and took as security for the repayment thereof, special bin receipts for 1,500 bushels of No. 1 wheat, stored in Valleau's elevator.

That all the bins named on the face of the receipts issued by W. H. Valleau, to the First National Bank of Decorah, and to the plaintiffs, Easton & Bigelow, at the time they took said receipts, did not contain the full quantity of wheat called for by the receipts.

That the bins were thereafter filled with the required quantity of No. 1 wheat.

That when the receipts were given to the bank, it was agreed between W. H. Valleau and the bank, that such bins should be filled with wheat after the acceptance of the receipts by the bank.

That when the receipt was given to Easton & Bigelow, it was agreed between Valleau and them that such bins should be filled after the acceptance of the receipt by them.

That Valleau, on the 6th day of May, 1876, called upon the cashier of the bank, and represented, or led said cashier to believe, that he was authorized to draw on Hodges & Co. for $10,000, and that such drafts would be paid.

That the cashier of the bank relied upon such representation of Valleau, and believing it to be true, received the drafts and surrendered the warehouse receipts to Valleau.

That the aforesaid transaction between the cashier of the bank and Valleau, was fraudulent on the part of Valleau.

That the bank and the plaintiffs did not, on the 6th day of May, 1876, receive the checks in evidence from Valleau, in actual payment of the notes of himself and Baker, relying on Valleau's responsibility, and did not, upon the faith of such responsibility, surrender the notes and warehouse receipts.

That said drafts for $5,000 each, were not paid by Hodges & Co.

That Valleau, subsequent to the delivery of the elevator receipts in question, shipped 11,500 bushels of the wheat covered by said receipts, to Hodges & Co.

That such shipment of said wheat was made by Valleau with intent to defraud the bank and plaintiffs.

That all, or the greater part of the wheat covered by

the receipts in question, was shipped out of the elevator before the 6th day of May, 1876.

That Hodges & Co. received from Valleau 11,500 bushels of the wheat covered by said receipts, and sold the same, and applied the proceeds to the credit of Valleau's account with them.

That neither the plaintiffs nor the bank verbally consented, prior to the 6th day of May, 1876, that the wheat on which they held warehouse receipts, or any part of it, might be shipped by William H. Valleau.

That the wheat covered by the receipts in question, at the time of its shipment, or at some time before, was mixed with other wheat in the elevator.

That it was so mixed without the knowledge or consent of the plaintiffs, or the officers of the bank.

That such mixture was intentional, and was made by some person in charge of the elevator and acting on behalf of Valleau.

That the defendants had no knowledge of such mixture.

That wheat of grade No. 1 was shipped from the elevator to and received by Hodges & Co., and the total quantity of such wheat received by them subsequent to January 31, 1876, was 19,488 30-60 bushels.

That during the same period of time, there was shipped from the Decorah elevator to other parties than the defendants, 7,622 40-100 bushels of No. 1 wheat.

That Hodges & Co., the defendants, after January 31, 1875, made general advances of money to William. H. Valleau, in the course of their business, on the credit of wheat shipped to them from his elevators in Decorah and at other places, and that the amount of such advances was equivalent to the value of the wheat so shipped.

That Hodges & Co. made no specific advances on ship-

ments to them of any of the wheat covered by said receipts.

That the defendants made a final settlement with Valleau on the 26th day of September, 1876, whereby Valleau was credited with the full value of all the wheat received from bins, and was released from the balance of Hodges & Co's. account against him.

That Hodges & Co., at the time of such settlement, knew of the pendency of the action commenced by the bank, in Winneshiek county, Iowa, against Valleau on the drafts.

That the defendants had some notice or knowledge that the wheat received by them from Valleau's elevator in Decorah, was covered by receipts held by the plaintiffs and the bank.

That the defendants, at some time during the shipment of said wheat, had some notice or knowledge that the transaction between the cashier of the bank and Valleau, on the 6th day of May, 1876, was fraudulent on the part of Valleau.

That the defendants were parties to the fraud of Valleau in his shipment to Hodges & Co., of the wheat covered by said receipts, with intent on his part to defraud the bank and plaintiffs.

That the officers of the bank and the plaintiffs obtained full knowledge that the defendants were parties to such fraud, April 25, 1877.

That the officers of the bank and the plaintiffs first had knowledge that the wheat covered by the receipts had been shipped out of the elevator on or about the 15th day of May, 1876; and

That the bank officers and the plaintiffs first had knowledge or information that such wheat was shipped to or received by Hodges & Co., September 27, 1876.

Such was the so-called special verdict, when reduced to

the form of direct statement, as nearly as the nature of the questions and answers will permit.

Upon the verdict being received and recorded, the plaintiffs moved for judgment thereon in their favor for the value of the wheat claimed to have been converted by the defendants, or such damages as the court should adjudge.

The defendants at the same time filed their motion to set aside the special verdict and for a new trial, assigning, among other reasons in support of the motion, that the verdict was inconsistent, evasive and inexplicit, and contained findings of fact not put in issue by the pleadings; and also that it was irregular and insufficient, and did not contain findings upon all the material issues in the case. (Record, p. 12, fol. 27.)

Both motions were brought on and heard before the court at the same time, and thereupon the court overruled the defendants' motion to set aside the verdict and for a new trial, and granted the motion of the plaintiffs for judgment, assessing their damages at the sum of $12,554.89, for which sum, besides costs, judgment was rendered against the defendants. To reverse the judgment so rendered, this writ of error was taken by the defendants.

## Assignment of Errors.

I.

The court erred in overruling the motion for a new trial.

II.

The court erred in rendering judgment upon the special verdict.

## Points of Law.

Whether error in overruling the motion for a new trial can be assigned without a bill of exceptions may be ques-

tionable, but, as it is clear that it may be so assigned for the rendition of judgment upon the special verdict, if the verdict was defective and insufficient in law to sustain the judgment, and as both assignments of error depend upon the same legal propositions, it is immaterial whether the first one be well assigned or not.

The propositions of law which we desire to present and urge are:

*First*—That the questions, with the answers returned to them by the jury, cannot be received and acted upon as a special verdict. They do not constitute a special verdict within the meaning of the law.

*Second*—That if the questions and answers are to be regarded as a special verdict, then the verdict was defective and insufficient, in not finding all the facts put in issue, and material and necessary to sustain the judgment which was rendered.

*Third*—That many of the facts found by the verdict were not responsive to the causes of action stated by the plaintiffs, nor within the issues found by the pleadings, and therefore did not justify the entry of a judgment thereon against the defendants.

*Fourth*—That the issuing and delivery of the warehouse receipt in security for the repayment of moneys loaned, as found by the jury, gave neither to the plaintiffs nor to the bank any title to, or lien upon, the wheat specified in such receipts, and, therefore, no judgment in favor of the plaintiffs should have been rendered upon the verdict.

I.

What constitutes a special verdict is a matter as well settled in the law as any one thing can be. Its form, the matters which it shall contain, and the mode of their statement, have been long familiar to the practitioner. They are such as the experience of the bar and of the courts have demonstrated to be most convenient, useful and necessary, and may be said to be of the essence of the thing itself. They are the expression or definition of the law upon the subject. The jury must find facts, and not evidence of facts, and their findings must be of such facts as are at issue between the parties upon their pleadings, and of every fact so at issue and material to the action or defense, referring the decision of the cause upon those facts to the court, with a conditional conclusion, that, if the court should be of opinion upon all the facts so found, that the plaintiff has a good cause of action, then they find for the plaintiff; but if the court should be of a contrary opinion, then they find for the defendant. In every case of a special verdict—indeed, we may say of a verdict of any kind—there must be a finding by the jury for the party in whose favor the judgment is rendered, and such finding must appear of record in the cause. There can be no judgment upon a verdict without such finding, and, where the verdict is special, the finding must appear from the conditional conclusion in which the jury say, according as the court shall be of opinion upon the facts found, that they do find for the party in whose favor the judgment is rendered.

Again, the facts found by special verdict should be concisely and methodically stated, and in narrative form. No other form is known, and no other should be tolerated in practice. The mode of questions and answers here inaugurated must, if tolerated, be productive of endless

confusion and uncertainty. If thirty-four questions may be propounded, and the answers received, so may four hundred or a thousand, and it will be found almost impossible to bring order out of the chaos of questions and answers thus introduced. Verdicts so rendered will necessarily be more or less unintelligible, confused and uncertain. It will often be found difficult, and sometimes impossible, to reduce them to the form of direct statements of facts, which will not be wanting in that accuracy and precision which are necessary to the correct administration of justice between the parties. This objection is illustrated in the case at bar by the answers of the jury to the twenty-ninth and thirtieth interrogatories propounded, in which the jury say that the defendants had *some* notice or knowledge that the wheat received by them was covered by the receipts held by the plaintiffs and the bank, and also that the defendants, at *some* time during the shipment of the wheat, had *some* notice or knowledge of the fraudulent transaction on the part of Valleau with the cashier of the bank on the 6th of May, 1876. Such findings of notice or knowledge upon which to found a charge of fraud, or to base a judgment, if such were the nature of the action, are altogether too indefinite and uncertain. The nature, kind and extent of such notice or knowledge, the circumstances under which it was received or obtained, and the time when it was received or obtained, are not found or stated, and no intelligent conclusion can be reached as to those matters. The facts constituting such notice or knowledge, the nature and extent of it, together with the time, place and circumstances under which the same was acquired, should have been found. If, at some time during the shipment of the wheat, the defendants had some notice or knowledge of Valleau's fraudulent transaction of the 6th of May, it was very important to know what that notice or knowledge was, and

*when* it was acquired, for if it was not acquired until the last car-load, or last 100 bushels, of the wheat was shipped and received, it would not affect the title of the defendants to any of the wheat previously shipped and received.

Again, in response to the thirty-first interrogatory, the jury say that the defendants were parties to the fraudulent transaction on the part of Valleau of May 6th, without finding how, when, where or under what circumstances they became such parties, or upon or from what facts such relation of parties to the fraud arose. Whether the defendants were parties to, or concerned in, the fraud of Valleau, was a conclusion to be drawn from facts found, and not in itself a fact to be found. The jury drew the inference, leaving the facts wholly untouched, which, as it concerned the character of a most respectable and reputable business house, was certainly a most vague, uncertain and unjust mode of dealing with such a question in a special verdict. If an imputation of the kind was to rest upon the defendants in the action, then certainly it was necessary that the facts, if any such existed, showing their participation in the fraud, should have been stated in the verdict, especially as nothing of the kind had been charged or intimated in the pleadings. Certainly enough should have been stated to show that the transactions as between the plaintiffs, the bank, and defendants and Valleau, were not what the record would otherwise clearly indicate, namely, a race of diligence between different creditors to obtain payment of their honest debts from a failing debtor.

But enough has already been said upon the general question of the impropriety and insufficiency of special verdicts in the form here adopted. There was, in truth, no verdict—no finding, subject to the opinion of the court, for or against either party, which was absolutely necessary

in order to authorize the pronouncing of judgment for or against either. The form adopted was an innovation—a departure from long established and well understood precedent, the effect of which, if sustained, will be to introduce confusion and uncertainty where otherwise clearness and certainty prevailed. It is respectfully submitted that this court ought not to sanction such innovation.

II.

The special verdict is more properly and correctly to be characterized by the facts put in issue by the pleadings which the jury *did not find*, than by those which they did find.

The complaint in the first count alleged that, at the time therein stated, the plaintiffs were entitled to the possession, and were then in possession, of certain wheat, in separate bins, in the warehouse of Valleau, in Decorah. That allegation was traversed by the answer. The jury found, not that the plaintiffs were in possession or entitled to the possession, and not that they were the owners of the wheat, but that Valleau was in possession and was the owner, and that the plaintiffs, at most, had or claimed only a lien upon the wheat as collateral security for the payment of certain moneys which they had loaned to Valleau. This was not only not finding the facts in issue upon which the plaintiffs claim judgment against the defendants, but it was finding a very different state of facts from which very different legal consequences and liabilities might follow.

In the second count of the complaint, as the foundation of their claim to recover damages against the defendants upon that count, the plaintiffs alleged the discounting of divers notes and drafts for, and the loaning of money to, Valleau, by the First National Bank of Decorah. Those allegations were denied by the answer, and not one of

them was found by the jury in their verdict. Not only did the jury not find them, but they found a state of facts utterly inconsistent with the truth of the allegations. Instead of discounting notes and drafts for and loaning money to Valleau, the jury found that the bank made three distinct loans to one J. H. Baker, and received from him special bin receipts for wheat as security for the repayment of the moneys loaned to him.

Another very material averment of the second count, traversed by the answer, and as to which the verdict was entirely silent, was that the moneys loaned and advanced by the bank, for the security of which the warehouse receipts were given, had not been repaid to the bank. The materiality of the averment is obvious, since the lien of the bank or its right to the wheat depended upon the nonpayment of the money in security for which the receipts were delivered, and unless it was found that payment had not been paid as averred, no cause of action was shown against the defendants under that count, and no judgment could be rendered against them upon it. It is apparent from the pleadings, verdict and judgment, that the judgment was rendered upon both counts.

But a still more vitally important allegation of fact contained in the second count, and denied by the answer, and upon which nothing was found in the verdict, was, that the bank had sold, assigned and transferred all of its right, title and interest in and to the wheat in that count mentioned, and all right of action to recover the same, or its value, to the plaintiffs, and that the plaintiffs were the lawful owners thereof, and of all right of action to recover such wheat, or its proceeds. With no proof of this allegation, and if, as we contend, the special verdict became the only evidence of what was proved or shown on the trial, then it is clear that the judgment rendered for

the value of the wheat claimed to have been pledged to the bank, was erroneous and must be reversed.

Other allegations of the complaint, such as, that demands were made, etc., were wholly unnoticed in the verdict; but the objections above specified are quite sufficient to show that the verdict was fatally defective, and that the judgment rendered upon it cannot stand.

The requisites of a special verdict, as known at the common law and in the practice of the federal courts and the courts of the several states, with only some exceptional cases to be found in the state of Wisconsin, and hereafter to be noticed, are very accurately and concisely stated in the opinion of the supreme court of Pennsylvania in *Wallingford* vs. *Dunlap*, 14 Pa. St., 31. The court say:

"The judgment in the court below is founded partly on facts found by a special verdict, and partly on what the court say are undisputed facts. The court enumerates to the jury what are the undisputed facts, and directs them to find a special verdict on the disputed facts. The court say to the jury: 'It is therefore *agreed* that you find a special verdict on the disputed facts, and that the court will enter such judgment thereon, and on the facts not disputed, as the law requires.' The paper book states that the jury returned negative answers to the two first points submitted to them, and then found especially as to the disputed facts.

"This proceeding is entirely anomalous. It is unknown, and unrecognized by the common law, or by the practice under the statute of Westminster the 2d, 13 Edw. I, Ch. 30, which, in fact, originated the special verdict, as it now exists. There did exist another species of special verdict, as where the jury returned a general verdict for the plaintiff, subject, nevertheless, to the opinion of the court, on a special case, stated by counsel on both sides, on a matter of law. (3 *Black.*, 378.) But this proceeding has gone out of practice, perhaps never existed in Pennsylvania, and is nothing like the present case.

"A special verdict is, where the jury find the facts of

the case, leaving the ultimate decision of the cause *upon those facts* to the court, concluding conditionally, that, if upon the whole matter thus found, the court should be of opinion that the plaintiff had a good cause of action, they then find for the plaintiff, and assess his damages; if otherwise, then for the defendant. (3 *Black.*, 378; *Boote on Suit at Law*, 158.) It is of the very essence of a special verdict that the jury should find the facts, on which the court is to pronounce judgment, according to law. (1 *East*, 111; *Lord Raymond*, 1581.) And the court will not intend anything, especially any fact not found by the jury. (1 *Wilson*, 55; 1 *Caine*, 60; 20 *Johns. Rep.*, 294.) An instance of which is found in 11 *Wheaton*, 415, where the assent of an executor is necessary, if the jury find a special verdict, stating facts from which they may have inferred such assent, but do not find it expressly, the court cannot intend it. I apprehend there is no reported case of any authority where the court, have gone beyond the facts found in the special verdict, for it is the province of the jury to judge of and find the facts, and the province of the court to declare the law on the facts so found. The undisputed facts ought to have been incorporated in the special verdict. And if they had omitted them by mistake, the court might, upon motion and full evidence, have amended the special verdict. (*Strange*, 514; 4 *Watts*, 259.) But the court is confined to the facts found by the special verdict. (2 *Yeates*, 543; 3 *Yeates*, 373.) And when a special verdict is given, the court ought to confine its judgment to that verdict.

"As to what the jury intended by a negative answer to the two first points submitted to them, it is not permitted us to intend what they meant, as they have not expressly found. Nor can we predicate our judgment partly upon what the court below say were undisputed facts, and partly upon the facts found.

"The special verdict is defective. We have no power to amend it. It is the duty of the plaintiffs' counsel to have the special verdict properly drawn up, settled and entered on the record. (1 *Johns. cases*, 393; *Coleman's cases*, 107.) If the facts are reduced to writing at the time of the trial, and have the assent of the jury, the verdict may be moulded into form afterwards, with the approbation of the court.

"But this special verdict is so defective and erroneous, and the judgment so anomalous in being entered partly

on the verdict and partly on what are called undisputed facts, that we must do what has often been done before, reverse the judgment and send the case back for a new trial. If a special verdict is defective or uncertain, and cannot be amended, judgment ought not to be entered upon it. And when it is entered, the judgment must be reversed as erroneous. *Lord Ray'd*, 1584; *Strange*, 887-1124; 6 *Cranch.*, 268; 1 *East.*, 111."

In *Barnes* vs. *Williams*, 11 Wheat., 415, CHIEF JUSTICE MARSHALL said:

"The claim of the plaintiff being founded upon a bequest of certain slaves, it was essential to a recovery at law, that the assent of the executor to the legacy should be proved. Although, in the opinion of the court, there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the court *could not, upon a special verdict, intend it.* The special verdict was defective in stating the evidence of the fact, instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plaintiff."

And the same doctrines are reiterated by this court in *Suydam* vs. *Williamson*, 20 How., 427, 432, 433, where the nature and requisites of a special verdict, and the practice in preparing it, are fully discussed. The court there say:

"It is of the very essence of a special verdict, that the jury should find the facts on which the court is to pronounce the judgment according to the law, and the court, in giving judgment, is *confined* to the facts so found."

Such being the well settled rule of this court, as well as of the state courts in general, there can be no doubt about the insufficiency of the verdict and consequent error in the judgment, unless the rule is to be disregarded and set at naught in deference to some exceptional and inconsistent decisions made by the supreme court of the state of Wisconsin, in which state the action happened to be

brought, and which decisions will doubtless be relied upon by the defendants in error. If the question was not one of a general nature and governed by the common law, or if it was one arising upon some statute of the state which, by the adoption of congress or otherwise was obligatory upon the federal courts, and to which the state court, by its decisions, had given a construction, then it might, with some propriety perhaps, be insisted that the decision of the state court should be followed. But the question as to what a special verdict *shall contain*, is not a question of state statutory construction at all. There is no statute of the state of Wisconsin regulating or touching this subject. In the courts of that state, as in the courts of the other states and in the federal courts, the question as to the contents of a special verdict or what facts must be found by it, is purely a common law question. There is a statute of the state introducing the anomalous practice of taking special verdicts by questions and answers, but it goes no farther. It does not declare what shall be the contents of the verdict, except by declaring that the questions and answers shall relate only to *material issues of fact*, which is but the enactment of the common law rule as to the contents of such verdict. This statute had been in force about one month when the trial took place, and was not the statute in force at the time the decisions relied upon by the defendants in error were made. Whether the practice thus introduced by the statute of taking special verdicts by questions and answers should be adopted by the federal courts, is a question not material to the decision of this cause. It is against error in matters of substance, and not mere form, that we are contending. Our proposition is, that the verdict was so defective in substance, that no judgment could be entered upon it. We submit, however, that the practice so introduced ought not to be adopted by the federal courts, and that it is not obligatory

upon them under the act of congress of June 1, 1872. We submit that the question is like that presented in *Nudd* vs. *Burrows*, 1 Otto, 426, 444, and in some other cases, where it was held that the act of congress was not intended to have such application. The plain, simple, adequate and uniform course of proceeding already existing, ought not to give way to such special local statutory innovations, and, if reasons are wanted in support of this proposition, they will be abundantly found in the confusion, uncertainty and conflict which have followed the enactment, as shown by the decisions of the supreme court of the state, made since the action below was tried.

But to return to our proposition, that there was no statute of the state regulating or declaring the contents of a special verdict, except as above stated, we quote at length the statutes of the state in force at the time of the trial, being sections 2857 and 2858 of the Revised Statutes of 1878:

"SEC. 2857. A general verdict is one by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court. Where, upon the trial, the case presents only questions of law, the court may, in its discretion, direct the jury to render a verdict, subject to the opinion of the court.

"SEC. 2858. The court, in its discretion, may, and when either party, at or before the close of the testimony, and before any argument to the jury is made or waived, shall so request, the court shall direct the jury to find a special verdict. Such verdict shall be prepared by the court in the form of questions in writing, relating only to *material issues of fact*, and admitting a direct answer, to which the jury shall make answer in writing. The court may also direct the jury, if they render a general verdict, to find in writing upon any particular question of fact, to be stated as aforesaid. In every action for the recovery

of money only, or specific real property, the jury may, in their discretion, when not otherwise directed by the court, render a general or a special verdict."

It does not appear, from the record in the action below, whether the special verdict was taken at the request of either party, or whether it was voluntarily directed by the court; and it is perhaps immaterial how this was. The language of the statute, we submit, clearly sustains us in our position, that the contents of the verdict, as known and established at the common law, are not in the least changed, affected or modified by the statute, and that the only change effected, or intended to be, was as to the form of the verdict, or that it should be by questions and answers, instead of being in the narrative form. Such is the obvious construction of the statute, and the supreme court of the state have never yet given it any other.

The foregoing statute came into operation on the 1st of November, 1878. The trial below took place in that month and in December following. But it is not the statute in force at the time the decisions of the supreme court of the state were made, which are relied upon as having changed the common law rule in that state with respect to the facts which must be found by a special verdict, and which will sustain a judgment entered upon it. Those decisions were made in 1876 and 1877, when the statute regulating the subject of special verdicts (Chap. XXI, Laws of Wisconsin, 1875,) read as follows:

"A general verdict is one by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court. In all civil cases the court shall, at the request of any party, direct the jury to find a special verdict: *Provided*, that such request be made at the close of

the testimony and before any argument to the jury. Such special verdict shall be in writing, and shall be filed with the clerk and entered upon the minutes."

By that statute, questions and answers were not authorized, and no directions were given as to the matters to which they should relate. It was but a statutory enactment of the common law definition of a special verdict—that is, that it was one by which the jury found the facts only *upon all or any of the issues*, leaving the judgment to the court. The statute did not attempt to define what facts *within the issues* the jury should specially find, but left those to be determined upon the rules and principles of the common law, which were well settled and understood. This is a familiar rule of statutory interpretation where the legislature are dealing with a subject known to, and defined by, the common law. The common law definition is presumed to be that intended by the legislature, unless the contrary expressly appears. The common law definition of a special verdict is, that it is one by which the jury specially find or pass upon *all the material facts at issue* between the parties; and the common law requirement, not interfered with by the statute, is, that *all* such facts shall be so found or passed upon. Thus the requirement of the common law corresponds with the requirement of the present statute, with a difference in form of expression merely, the words of the statute, "material issues of fact," signifying the same thing, and being intended to include all the material facts at issue *upon the pleadings*.

The questions before the supreme court of the state were not, therefore, at the time they arose and were decided, questions of statutory construction, but were purely common law questions as to the nature and requisites of a special verdict with respect to the facts which must be

found by it; and it will be seen, on examination of the cases, that they were so considered and decided by the court. There was no allusion in any of them to the above statute or to any other statute of the state, except in a single instance where the existence and finding by the jury of the fact omitted was a necessary and unavoidable inference from other facts which they did find, and where it was held that the verdict was amendable, or that the defect was cured by the statute of amendments. But that statute is only applicable to verdicts of that peculiar nature, and has only been applied by the court in a single instance, all the other cases having gone off, not upon the statute of amendments, for it had no application, but upon what the court has seen fit to hold as common law principles governing the subject. They were cases like the present, where the finding or existence of the facts omitted had no necessary or unavoidable connection with the facts which were found.

The earlier decisions of the court, running down through the first forty volumes of its reports, had been consistent and uniform in holding to the settled rules of the common law with respect to special verdicts. Many cases had arisen and been decided, and in all of them those rules had been rigidly adhered to. With the forty-first volume there came a change, most unaccountable in its nature, and from that time until a very recent period, it may with truth be admitted that the sound and well settled rules of the common law with respect to special verdicts have not prevailed in the courts of the state of Wisconsin. The forty-first volume brought new light and new learning to the profession, in the shape of four cases, which are said to have made old learning and familiarity in the principles of the common law useless to its members. Those four decisions, in the order of their announcement from

the bench, though not in the order of their appearance in the book, were—

*Hutchinson* vs. *The Railway Co.*, 41 Wis., 541;
*McNara* vs. *The Railway Co.*, 41 Wis., 69;
*McHugh* vs. *The Railway Co.*, 41 Wis., 79; and
*Williams* vs. *Porter*, 41 Wis., 422.

Those decisions were followed by

*Ward* vs. *Busack*, 46 Wis., 407,

and perhaps some others.

In the first case, *Hutchinson* vs. *The Railway Co.*, the decision was founded in part upon the statute of amendments, because it appeared from the facts expressly found by the jury, that the fact omitted must necessarily have been found by them in favor of the plaintiff. But the case went further, and established the novel and dangerous doctrine that in the absence of a finding by the jury of a material fact in issue between the parties, the court would look into the evidence preserved by the bill of exceptions, and see how the jury ought to have found the fact in view of such evidence, had the question been submitted to them, and, usurping the functions of the jury, that the court on appeal would find the fact, and having found it, would pronounce judgment accordingly. This was a most gross and unwarranted departure from every well settled principle defining what was within the province of the court and what within that of the jury, and confounding all distinctions between the two. It was in truth holding that there need be no finding at all in the trial court upon material issues of fact made, and that judgment might be entered in that court without the determination of such issues, or the finding of the facts involved in them, by either court or jury. It is true the court said, when the evidence, as shown by the bill of

exceptions, was "undisputed," they would find the fact, yet that was usurping the office of the jury, for although a witness might not be disputed, still the jury might not credit his testimony. It is impossible to suppose that a proceeding so utterly anomalous and unknown will ever receive the sanction of this court, or that the rule will be established here, that the court will examine, sift and weigh the evidence contained in the record, in order to determine how the jury, finding a special verdict, might or would have found particular facts in issue, had such facts been submitted to them. If a state court falls into error in matters of this nature, its decisions do not become guides for the action of the federal courts, even in like cases arising in the same state. The federal courts will not commit error because a state court has sanctioned it, and especially not in the face of their own previous decisions, by which the correct rule of law has been established.

The next case, *McNara* vs *The Railway Co.*, merely followed and reiterated the erroneous doctrines of the first; and the same remark may be made of *Williams* vs. *Porter*.

But the most surprising error, if there can be degrees of surprise in matters so utterly and palpably erroneous, is that found in *McHugh* vs. *The Railway Co.*, where the court made the most unheard of and extraordinary application of the rule—that every reasonable presumption will be made in support of the judgment of a court of competent jurisdiction. The court so applied that rule, as to hold that errors appearing on the face of the record were not errors. They presumed the errors off of the record and out of the case; for, if there was anything incontestably settled by the decisions of all of the courts, both of England and America, up to that time, it was that, upon the record there presented, the judgment appealed from was erroneous. No English or American court had ever held otherwise, and none had ever imag-

ined the application of the doctrine of presumption to such a case, a doctrine which is applicable only in the absence of errors apparent on the record. It was an error akin to the error already committed, and the court ought not to be denied the merit of consistency in its decisions. If, with a bill of exceptions, the court would look into the evidence, to see how the jury might have found the facts omitted, then, without such bill, it would indulge such presumption as was necessary to sustain the judgment. With nothing but the omissions of the jury to act upon, the court will presume either that the omitted facts existed or that they did not exist, or that the evidence was all one way in support of them, or that no evidence was offered, according to the exigencies of the particular case, and so as to sustain the iudgment which was rendered. In that case there was no bill of exceptions, and such were the strange and extraordinary views taken by the court, by which the court *dispensed with* a verdict of any kind, either special or general, in the cause. Very different were the views expressed by this court in *Barnes* vs. *Williams*, where, *with the evidence of the fact before it* in the special verdict, from which the court was of opinion the jury might have found the fact, yet, as they had not found it, the court said it could not intend it.

In *Ward* vs. *Busack*, the doctrine of helping out the omissions of a special verdict by examining into the evidence preserved in the bill of exceptions, to see whether it was uncontradicted, was again applied by a divided court. It appears, from the report of the case, that the cases in the 41 Wisconsin were decided by only two of the justices, the chief justice having been absent. The chief justice filed his dissent, as follows:

"But I cannot give my assent to the *dictum*, that the court may eke out the failure of a special verdict to pass

on all the issues, by holding that the evidence on the question omitted appears to the court to be uncontradicted and satisfactory. That is invading the province of the jury and violating the rule that a verdict must pass upon all the issues. *Heeron* vs. *Beckwith*, 1 Wis., 17, and cases cited in the note of Vilas & Bryant.

"The learned justice who writes the opinion of the court cites, in support of the *dictum*, three cases in 41 Wis. Those cases were determined in my absence, and appear to proceed on no authority. They are more or less in conflict with many well considered cases in the court. And it is to be hoped they will not be followed.

"It is essential to the right administration of justice that a sharp line should be drawn between the functions of the jury and the functions of the court. And I fear that, among the many laxities induced by the code, there is a tendency to relax this rule, creating vicious confusion of function."

Some recent decisions of the court seem very strongly to indicate that the hope expressed by the chief justice is about to be realized by the return of the court to the principles of decision uniformly prevailing in it prior to the appearance of the forty-first volume.

Thus, in *Eberhardt* vs. *Sanger*, 51 Wis., 72, 80, the court say:

"In conclusion, we would state that we are inclined to the opinion, that the 'questions in writing relating only to material issues of fact,' to be submitted to the jury under section 2858, R. S., should be limited to the controverted facts *put in issue by the pleadings*, or such as might properly have been put in issue by the pleadings; but we withhold any decision upon this point, for reasons stated."

Such is the only judicial construction the present statute has received, and which is clearly in accordance with the plain meaning of the statute. The questions and answers must relate to the material facts put in issue by the pleadings and to all such facts, whether they are

such as are proved by undisputed evidence before the jury, or facts as to which the evidence may be conflicting. No distinction, based upon the nature, kind or extent of the evidence produced upon the trial, can be made with respect to the facts which must be found by the jury. The statute authorizes no such distinction, and there is no reason, principle or authority upon which it can be justified.

But, in a still later case (*Kelley* vs. *Railway Co.*, 53 Wis., 74), the court, as we understand the decision, has returned to the rule of its earlier decisions, and of the decisions of the courts in general, upon the subject of special verdicts, so that the conflicts and inconsistencies of the past few years may be expected to disappear. The following is the language of the court in that case:

"There is no bill of exceptions settled in the case, and this appeal brings up only the pleadings, verdict, motion for judgment, and judgment.

"Larkin, the deceased, was injured and died while section 1816, R. S., was in force, which made the company liable to its employees for injuries occurring through the negligence of its other agents or servants.

"Without setting out at length the thirty questions submitted to the jury for them to answer by their special verdict, it is sufficient for the purposes of this case to state that the jury *have not found* by their special verdict that the defendant company, or any of its agents or servants, were guilty of any carelessness or negligence which caused the injury resulting in the death of the deceased. *No interrogatory was submitted to them upon that subject.* This defect in the verdict must be fatal to the right of the plaintiff to a judgment in his favor, unless either it is cured by what is claimed to be a general verdict in his favor, or the finding that the cars which collided and caused the injury were permitted to run on the track, out of the elevator and on the track, alongside of the same, without a brakeman thereon, is a sufficient finding of fact, from which the court can infer negligence as a conclusion.

"It is argued by the learned counsel for the appellant, that there is a general verdict in this case for the plaintiff; that such verdict must be construed to have found in favor of the plaintiff upon all questions of fact not covered by the special findings of fact necessary to sustain the general verdict; and that it must be held, therefore, that the jury have found that the defendant was guilty of negligence, which caused the injury. We have grave doubts whether it is proper practice under our statute, when a special verdict is demanded by either party, to take a general verdict upon the whole case. Such a practice, it seems to me, would complicate the case so that it would be difficult to determine what issues were submitted to the jury for their special determination, and what were reserved to be covered by the general verdict. But, whatever may be the correct rule in respect to this question, we are of opinion that in this case there was no general verdict rendered by the jury upon the whole case. The part of the verdict relied upon by the learned counsel for the appellant, as a general verdict upon the whole case in favor of the plaintiff, it seems to us, is simply an assessment of damages in his favor, supposing the plaintiff to be entitled to recover upon the facts found by the special verdict. The record shows that after the jury had answered all the questions propounded as a special verdict, they added thereto the following: 'We, the jurors in the above entitled action, find for the plaintiff to the amount of $2,000.'

"As the record shows that a special verdict was demanded by the defendant on the trial, and that a special verdict was found by the jury, we must construe the finding as simply a finding of the damages sustained in case the plaintiff is entitled to recover in the action upon the special facts found, and not a general verdict in his favor upon the whole case. A special verdict having been demanded and ordered, we are not to presume that the court directed the jury to find a general verdict upon the whole case. We do not think the difficulty in the special verdict is helped out by what is called the general verdict by the counsel for the appellant."

The court then proceeded to discuss the question whether the verdict could be helped out on the other ground, and decided that it could not, and that no judgment could be entered upon it in favor of the plaintiff, thus conforming

to the rule of the common law in its utmost stringency with respect to what facts must be found by a special verdict.

And another late case in which the court, referring with approbation to one of its earlier decisions, 13 Wis., 419, has held the same rule, is *Cotzhausen* vs. *Simon*, 47 Wis., 103. The point in decision is thus correctly stated in the head-note of the reporter:

"In an action at law, where there is no general verdict, the material issues of fact should be passed upon by the special findings of the jury; and such findings should be so full, clear and consistent, that the proper judgment may be rendered thereon as a legal conclusion from the facts found."

It is submitted, therefore, even if the decisions of the supreme court of the state are to govern upon the question under consideration, that the verdict was clearly insufficient to authorize the entry of judgment thereon by the court below.

And the cases above cited are quite sufficient to illustrate the correctness of our statement as to the confusion and uncertainty which have followed the introduction of questions and answers, in place of the familiar form of a verdict as known to the common law.

III.

Our third proposition does not admit of elaboration. It is self-evident that very many of the facts found are not responsive to the issues found by the pleadings. Some of them are facts found, from which some of the facts at issue by the pleadings might be inferred, but not the facts themselves at issue. Others, and a large proportion, are facts found not pertaining to the causes of action stated in the complaint, or within the scope of the com-

plaint, but to supposed causes of action of a very different nature, such as fraud, or conspiracy to defraud, of which the complaint contained no charge and gave no intimation. The verdict must follow, and be responsive to the facts alleged in the pleadings, for it is upon those facts that the party complaining must recover, if at all. The allegations and proofs must correspond, and, unless they do, there can be no recovery. The verdict, which is but the evidence of the facts proved, must agree with the allegations. These are familiar principles.

IV.

In support of our fourth proposition, we refer the court to a statute of the state of Iowa, and to a decision of the supreme court of that state, giving a construction to that statute. The transactions in question arose in the state of Iowa, and are to be governed by the laws of that state. The warehouse receipts in question were issued in that state by a warehouseman residing and transacting his business there to persons there resident, as collateral security for the repayment of moneys there loaned. The supreme court of the state has decided that warehouse receipts so issued contravene the statute, and are void, so that no title to the property covered by the receipts passes, and no valid lien upon it is created. The statute of the state entitled "OF WAREHOUSEMEN AND CARRIERS," in force at the time the receipts in question were given, is Chap. X, of Title XIV, of the Revised Code of the state, being sections 2171 to 2176 inclusive. The language of the statute is quoted by the court in its opinion in the case to which we refer.

*Sexton* vs. *Abbott & Graham*, 53 Iowa, 181, 195, 196.

Speaking of receipts so issued, the court there say:

"They were issued merely as security. The appellant insists that, as such, they are valid, being evidence of a pledge of the quantity of the grain therein described.

"Section 2172 of the code provides, that 'No warehouseman * * * shall issue any receipt * * * for any personal property to any person unless such property is in store;' and section 2171 provides, that 'All warehouse receipts, or other evidences of the deposit of property, * * * shall be, in the hands of the holder thereof, presumptive evidence of title to said property.'

"It is evident that the property contemplated by the statute, for which a warehouse receipt may be issued, must be the property of the receipt holder. This is so, because the statute provides that the receipt shall be presumptive evidence of title in the holder. If issued in a case where the holder has no title, and where the receipt was not designed by either party to be evidence of title, it appears to us that it is issued in contravention of the statute, and cannot be sustained.

"Under the rule contended for by the appellant, we should have two distinct kinds of receipts, although of the same import on their face—the one kind issued as evidence of title, and the other merely as a mode of effecting a lien. The allowance of two distinct kinds of receipts of the same import upon their face would have a tendency to introduce uncertainty and confusion, for which no advantage, so far as we can discover, would be a sufficient compensation. We should hesitate, therefore, about sanctioning the rule contended for, even if the provisions of the statute were less explicit than they are."

The special verdict is explicit as to the purposes for which the warehouse receipts in question were issued, and that they were issued as security for the repayment of moneys loaned. The receipts were, therefore, void under the statute, and gave to the plaintiffs and the bank no title to or lien upon the wheat specified in them.

Another fact found by the jury was also equally fatal to the validity of the receipts under the statute, and that

was that the wheat purporting to be covered by the receipts, was not "in store" in the bins at the time the receipts were issued, which fact was well known, both to the plaintiffs and the bank, when they took the receipts from the warehouseman.

It is submitted that, upon any and all of the foregoing propositions, the judgment below should be reversed and a new trial awarded.

L. S. DIXON,
*Of Counsel for Plaintiffs in Error.*

November 4, 1882.

16-418

IN THE

# Supreme Court of the United States.

L. F. HODGES AND JAMES H. SMITH, PLAINTIFFS IN ERROR,

*vs.*

JAMES H. EASTON ET ALS., DEFENDANTS IN ERROR.

No. 92.

*Reply to the Brief and Argument of Plaintiffs in Error.*

This case was tried in the Circuit Court of the United States in and for the Eastern District of Wisconsin. It was tried in a state where for nearly twenty years all forms of actions have been abolished; in a state where there is no longer assumpsit, debt, covenant, detinue, trespass, trespass on the case, trover, replevin, ejectment, &c.; in a state where such a thing as a technical common-law special verdict has not been known for the past twenty years; and in a state where the most liberal provisions are made for amendments of every kind. A variance between allegations and proof is no longer regarded. The court is no longer obliged to see that every *i* is dotted and every *t* is crossed. There can be no doubt that if this case was in the Supreme Court of Wisconsin the judgment would be affirmed with damages for delay. It is manifest, I think, that in the state court none of the points

taken by the learned counsel for the plaintiffs in error would be sustained. The authorities cited in my brief, and the statutes and authorities which I shall here cite, seem to me to place my assertion beyond the possibility of doubt.

The learned counsel for plaintiffs in error commences his argument on page 10 by the statement that "what constitutes a special verdict is a matter as well settled in the law as any one thing can be." This statement is conceded as applied to a technical common-law special verdict. If we are dealing with old technical forms of the common law, without any regard to the great changes produced by the Code, and the statutory provisions as to abolishing forms of actions and proceedings, and the statutory powers of amendment, then my learned friend is right. There is no pretence that the verdict in this cause would stand as a technical special verdict at the common law. The cases of *Wallingford vs. Dunlop*, 14th Pa. State, 31, cited on page 15 of plaintiffs' brief, and *Baines vs. Williams*, 11th Wheaton, 415, and *Suydam vs. Williamson*, 20th Howard, 427, cited on page 17 of the same brief, are each and all cases under the strict technical practice of the common law. They certainly decide the point to which they are cited.

But I respectfully submit that these cases are not applicable, and should not control, in the federal courts, at least in those states where codes have been adopted, where common-law forms are no longer followed, where even actions are abolished, and where such broad and liberal statutes of amendments exist as are found in and form part of the statutory law of the state, and are in full force and effect, and which statutes have been repeatedly passed upon by the courts of the state.

It is not, as it seems to me, a question whether the federal courts *shall* adopt the practice of the state courts, but is rather a question of whether they *may*, if they choose, do so. I grant that the federal court in Wisconsin has the

power to adhere to all the technical forms of common-law actions, execpt as modified by the laws of Congress. But what I claim is, that the federal court in Wisconsin may, if it so desires, adopt the practice, as far as it relates to forms, to amendments, to submitting or not special questions of fact to a jury; and that when it does adopt such practice, and seek to follow it, that then the court will and thereby does adopt and follow the decisions of the state court on that practice.

As far back as the year 1849, the legislature of the State of Wisconsin had sought to mitigate the technicalities of the common law by a series of sections on the subject of amendments. Chapter 100, Revised Statutes of 1849, pages 530 to 532, will show how far the technical rules of the common law were done away with even at this early date. Section 7 of the chapter relates to verdicts, and states no less than thirteen different imperfections, omissions, or defects which shall not be cause of reversal of a judgment. The 14th subdivision of the section is general. It declares the judgment shall not be reversed, impaired, or affected "for any other default or negligence of any clerk or officer of the court, or of the parties or their counsellors or attorneys, by which neither party shall have been prejudiced." Section 19 declares that "no declaration, writ, process, or other proceedings in the courts or course of justice, shall be abated, arrested, quashed, or reversed, for any circumstantial error or mistakes, when the person and case may be rightly understood by the court, nor through defect or want of power only." During the existence of these statutes the common-law form of actions and proceedings were in force. The Code had not been adopted.

In 1858 the statutes were again revised, and the New York Code substantially adopted and carried into the statutes. By these statutes the entire course of practice was changed. Further and far more liberal provisions as to amendments, and a new system of procedure in trials, were

adopted. "Old things had passed away, and all things had become new." Among other provisions making a marked change were sections 10 and 11, chapter 132, page 753, Revised Statutes of 1858. These sections, or as much of them as bear on this question, are as follows: "A general verdict is that by which the jury pronounce generally upon all or any of the issues either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court." In section 11 the following: "In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing *upon all* OR ANY *of the issues*, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict shall be filed with the clerk and entered upon the minutes." Section 14 of the same chapter provides: "When a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."

Section 16, page 754, section 31, page 725, and section 40, page 726, of Revised Statutes of 1858, also bear upon the question. Section 16 provides that the judge may, in his discretion, entertain a motion to set aside a verdict, "but such motion, in actions hereafter tried, if heard upon the merits, can only be heard at the same term or circuit at which the trial is had, when such motion is heard and decided *upon the minutes of the judge*, and if an appeal is taken from the decision, *a case on exceptions must be settled in the usual form, upon which the argument of the appeal must be heard.*"

The reason for this provision must be apparent. The "minutes" of the judge are no part of the record. The "minutes" of the judge might show admissions made, or

proof of facts waived, in short many facts which a verdict would not show.

Sections 31 to 42 inclusive of chapter 125 of Revised Statutes of 1858 are, on the subject of amendments, variances. Section 40 reads as follows: "The court shall in every stage of an action disregard any error or defect in pleadings or proceedings, which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."

In 1871 the statutes were again compiled and known as Taylor's Statutes. Section 14, page 1496, 2d Taylor, and sections 41 and 42, page 1446 of same book, are the same as the statutes I have above quoted, as to general and special verdicts and amendments.

These statutes continued in force until 1875, when the section quoted on page 20 of plaintiffs' brief was adopted. And on November 1st, 1878, the Revised Statutes of 1878 went into effect, and contain the two sections quoted on page 19 of plaintiffs' brief.

I have thus traced the marked changes in the modes and forms of proceedings in so-called common-law actions for the purpose of clearly showing that the technical, not to say harsh and oppressive, rules of the common law, as to technical special verdicts, do not apply under this new order of things.

It might be said (as the learned counsel of plaintiffs in error says of a special verdict at common law), that, under this new system and order of things, "what constitutes a special verdict is a matter as well settled in the law as any one thing can be."

The decisions under this Code, are uniform and unvarying, that facts *admitted by the pleadings* need not be found in a so-called special verdict. Admissions made during the trial may be acted on by the judge on a motion made on the minutes of the judge.

In *Barto vs. Heinrod*, 8 N. Y., 483, there was no general verdict. The jury found specially a single fact. The

other facts were admitted in the pleadings. Held sufficient to warrant judgment.

In *Jones vs. Brooklyn Life Ins. Co.*, 61st N. Y., 82, only three questions were submitted to the jury. The jury found neither a general or special verdict. It was claimed in the appellate court that there was a mistrial; that there were several defences, but no evidence was given except on one defence.

The court held that the statute of amendments of New York, to the effect "that the court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of any such error or defect," [the same as the Wisconsin statute,] was sufficiently broad to prevent the reversal of the judgment.

The court say: "But it is said by the defendant that the jury, under the Code, has a discretion to find either a general or special verdict, and that discretion has been interfered with. . . . . *No complaint at the trial was made that this discretion was interfered with.*" The judgment was affirmed.

There are decisions in Wisconsin to the effect that it is unnecessary to find facts admitted by the pleadings.

In *Hawkes vs. Dodge Co. Mutual Ins. Co.*, 11th Wis., 191, Justice COLE says: "It is said that the finding is not sufficient, with respect to the notice of loss, of the value of property, &c. But the obvious answer to these objections is that the facts are averred in the complaint and are not denied in the answer, and are, therefore, to be taken as true. It is as unnecessary for the court to find the facts admitted by the pleadings as it was unnecessary for a special verdict to state them." In this case the court hold that a verbal finding of a fact not in the written finding, but shown by bill of exceptions, might be accepted to support the judgment. When the allegations of the complaint are not denied no finding is necessary.—(Donner vs. Sexton, 17 Wis., 29.)

In *Sylvester vs. Guernsey*, 22 Wis., 569, a finding by the court that "from the admissions of the defendants in their respective answers and from the verdict of the jury, and from the evidence in the case that the complaint is true, was sufficient."

These decisions are still the law in Wisconsin. It is no longer necessary to submit questions admitted by the pleadings.

Later the court advanced a step further, and decided that it was no longer necessary nor proper to submit questions to the jury to find facts which were conceded or not disputed.

These decisions are attacked by the learned counsel of the plaintiffs in error. He says: "The earlier decisions of the court, running down through the first forty volumes of its reports, had been uniform in holding to the settled rules of the common law with respect to special verdicts."

I have shown that the statement is not technically correct. Such had not been the "uniform holding." At the common law the special verdict must contain every fact necessary to support the judgment. The court would not look outside of the verdict. The verdict, and it alone, was the only source to look for facts. The admissions in the record went for nothing. The stipulations of parties went for nothing. These technical rules the courts of Wisconsin did not observe or follow.

The Wisconsin courts looked into the record outside of the verdict; *nay, even into a bill of exceptions.*

Later the court found itself obliged to go one step further, and declare the law to be that even *undisputed facts* need not be found by the jury, and that when the court had rendered judgment without all the facts found by the jury, and there was no bill of exceptions preserving the evidence, they would presume in favor of the judgment, that the facts were either admitted or clearly proved on the trial. This, it seems to me, was only carrying out, in all its integrity, the whole scope, purpose, and design of the laws of the state.

The learned counsel expresses the belief that the Wisconsin Supreme Court "has returned to the rule of its earlier decisions, and of the decisions of the courts in general upon the subject of special verdicts, so that the conflicts and inconsistencies of the past few years may be expected to disappear." He cites 53d Wis., 74, as the case which supports his "returning" theory. Unfortunately for his "return" theory, the Supreme Court of Wisconsin has again affirmed, what it has so frequently done before, that "only the controverted facts need be submitted to the jury for a special verdict." The case which thus reaffirms the cases that so hold is *Ault vs. Wheeler & Wilson Manfy. Co.*, 54 Wis., 304, decided at January term, 1882.

This is the last deliverance of the court, and probably must be accepted as final and conclusive, so far at least as the state courts are concerned.

Now, if this be the law of Wisconsin, why should it not be followed by the federal courts within that state?

In conclusion, I beg to call the attention of the court to the case of *Thayer vs. Marsh*, 75 New York, 342, as laying down a proper and sensible rule in a class of cases similar to the one here before the court.

This trial was had without any request or apparently any desire to contest any question but the fraudulent conversion of property. All other questions in the case seem to have been waived.

Under these circumstances the reasoning of *Thayer vs. Marsh* seems very much in point. In that case it was claimed in the appellate court that "an essential part of the plaintiff's case to be affirmatively established" *was not averred nor proven.*

The court hold that if such defect existed the judgment would not be reversed, unless the precise defect was pointed out and reached by a proper exception taken upon the trial. "It is a salutary rule which requires a party to take his ground when he has an opportunity to object, so that the

other party shall not be misled by his silence, and he is not allowed to spring an objection for the first time after the trial has been concluded, and after the opportunity is passed for his adversary to make additional proof, whereby the objection might have been obviated." . . . The court further say that if the specific objection had been taken at the proper time, "the plaintiff would have been permitted to amend his pleading, and to prove, if he was able, the fact of Pulver's liability." Judgment was affirmed.

In *Chemung Canal Bank vs. Lowery*, 93d U. S., 72, this court followed the Wisconsin decisions so far as to hold that in a common-law action the defendant could demur to plaintiff's complaint on the ground that it appeared on the face of the complaint that the cause of action was barred by the statute of limitations.

Turning away from the Wisconsin decisions, I find that the Congress of the United States has made a very liberal law of amendments. I refer to section 954 of United States Revised Statutes, and to the decisions there noted. Of the large number of cases there cited I call attention to the cases of *Stockton et als. vs. Bishop*, 4 How., 167; *Parks vs. Turner et als.*, 12 Howard, 44; *Railway Co. vs. Lindsay*, 4th Wall., 656.

In the first case there was no bill of exceptions. The declaration contained two counts. It was claimed the second count was so defective that no judgment could be rendered on it. The alleged defect was that there were no dates specified. This court held that the plaintiff having gone to trial on the general issue, "the presumption is that the proof supplied the defective statement."

An objection was taken to the form of the verdict. "Who the jurors were, or how many found the verdict, does not appear, nor does it appear that they were sworn to try the issue, further than the jury say in their verdict."

The judge, on page 168, after quoting the 32d section of the judiciary act of 1789, "that defects of form must be

disregarded," says: "Why Congress so provided in 1789 is obvious. No modes of proceeding were prescribed by the act in civil causes at common law, and the modes observed in the English courts were left to apply as a general rule; *these were formal and technical*, and forasmuch as by the 35th section all parties to causes in courts of the United States might plead and manage their own causes personally, if they saw proper, *technicalities* could not be required." And notwithstanding the many serious defects in the record, the judgment was affirmed.

The second case was one in which Chief Justice Taney said the verdict was so defective, if the court acted "strictly upon common-law forms and modes of proceedings, no judgment could have legally been entered, because the verdict omits to specify in express terms and in the established form the amount which the defendants in error were entitled to recover." He then quotes the 32d section of chapter 20 of 1789, and affirms the judgment.

The third case was tried by the court without a jury. There was a finding of facts by the court. It was claimed there was a variance between the facts as found and the case made by the pleadings. No objection appeared to have been taken to the evidence and no exception to the findings. The question was presented for the first time in the Supreme Court. It was held the party had waived his rights in the lower court, "and was concluded by that waiver" in the appellate court.

And in this connection it may be proper to call the attention of this court to a series of decisions, commencing with *Pleasants vs. Fant*, 22d Wallace, 116, to the effect that in a common-law action and in a case tried by a jury, the judge may direct a verdict, where the facts are undisputed, or where on the entire evidence the presiding judge is satisfied the evidence would not warrant a verdict.

This is now the settled rule of law of this court. Justice MILLER, in that case, holds that the judge need not go

through "the idle ceremony, in such a case, of submitting to the jury the testimony on which the plaintiff relies, *when it is clear to the judicial mind* that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had." He holds in that case that the judge was right in not submitting the case to the jury.

In *Griggs vs. Houston*, 104 U. S., 553, the same rule is laid down. The opinion is by Chief Justice Waite. "It was right, therefore, to direct a verdict for the defendants." The evidence was undisputed.

I submit, therefore, that by the provisions of the Wisconsin statutes, and the decisions I have cited, the plaintiffs in error have no standing in this court. They have waived all the exceptions and errors of which they now complain. They were silent when the judge submitted the questions he did. They allowed all the questions without raising an objection of any kind. They asked no question to be submitted as to the ownership of the second cause of action, or as to value of the property. They had the right to so ask. Had they asked for either, the judge would, no doubt, have granted their request. The fact that they did not do so should conclude them.

In their motion for a new trial they did not specify either one of these technical defects. The motion was in the most general terms. Such general objections will not avail to raise technical defects.

It would seem, then, that under such an anomalous practice, the decisions of the Wisconsin courts in favor of upholding judgments by presuming that the facts were proven or not disputed, (when the entire record of proceedings is not before the court,) are not only just and equitable, but sound in principle and in logic. Failure to act at the proper time and manner in the trial court, should conclude the party in the appellate court.

As to the effect of the recital in the judgment, I desire to call the attention of the court to the case of *Mitchell vs. Renlinson*, 52 Wis., 162.

As to the warehouse receipts passing title to property when pledged as collateral security—

*Hibbard vs. Merchants' Bank*, 11th Northwestern Reports, 834.

Hoyt vs. Hartford F. Ins. Co., 33d N. Y. [26th Hun., page 418.]

H. M. FINCH,
*Of Counsel for Deft. in Error.*




1648

# SUPREME COURT OF THE UNITED STATES.

L. F. HODGES AND JAMES H. SMITH, PLAINTIFFS IN ERROR,

vs.

JAMES H. EASTON AND ALFRED E. BIGELOW, DEFENDANTS IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

H. M. FINCH,
*Of Counsel for Defendants in Error.*

CRAMER, AIKENS & CRAMER, MILWAUKEE

# SUPREME COURT

OF THE

# UNITED STATES.

L. F. HODGES AND JAMES H. SMITH,
*Plaintiffs in Error,*

*vs.*

JAMES H. EASTON AND ALFRED E. BIGELOW,
*Defendants in Error.*

## *Brief and Argument of Defendants in Error.*

This suit was commenced on the 28th day of October, 1876. The complaint states two causes of action.

The first cause of action alleges that plaintiffs were the owners of and lawfully entitled to the possession of ten thousand bushels of wheat, of the value of ten thousand dollars, which was in separate bins in the warehouse of one Valleau, in Decorah, Iowa; that Valleau wrongfully and tortiously shipped the wheat to defendants, in the City of Milwaukee; that defendants received the wheat, and wrongfully and tortiously sold it, and converted the proceeds to their own use; that plaintiffs demanded the wheat of defendants, and defendants refused to surrender or to deliver the wheat to plaintiffs.

The second cause of action alleges that in the year 1876

the First National Bank of Decorah, a banking corporation created under the laws of the United States, and located at Decorah, in the State of Iowa, discounted notes and drafts for, and loaned money to, one William H. Valleau, to the amount of ten thousand dollars; that Valleau, to secure the re payment of the loans, delivered to the bank, and the bank received ten thousand bushels of wheat, which wheat was the property of Valleau, and was stored in separate bins in a warehouse in Decorah, and was of the value of ten thousand dollars; that Valleau, without re-paying the money, wrongfully and tortiously took and removed the wheat from the warehouse, and shipped it to the defendants at Milwaukee; that defendants wrongfully and tortiously received and sold the wheat, and converted the proceeds to their own use; that demand was made by plaintiffs for the wheat, and defendants refused to deliver up the wheat; that the claim and right of action was assigned to plaintiffs, and that plaintiffs were the lawful owners and holders, etc.

The prayer of the complaint was a demand for judgment for the conversion of the wheat mentioned in the two causes of action, to the amount of twenty thousand dollars and costs of suit.

The answer was a general denial.

The issues came on for trial on the 11th day of November, 1878, and continued from day to day until the 4th day of December, 1878, when the jury brought in a special verdict in answer to questions propounded by the Court. This verdict is printed in full on pages 9, 10 and 11 of the printed case.

The special verdict finds the following facts: That the First National Bank of Decorah loaned to J. H. Baker, on the 31st day of January, 1876, $3,000, and took as security therefor a special bin receipt for 4,000 bushels of No. 1 wheat in Valleau's elevator, in Decorah; that Easton and Bigelow loaned to William H. Valleau on February 11, 1876, $3,000, and took as security for its re-payment special bin receipts for 4,000 bushels of No. 1 wheat in Valleau's elevator, in Decorah; that the

First National Bank of Decorah loaned to J. H. Baker, on the 16th day of February, 1876, $1,300, and took as security for its re-payment special bin receipts for 1,500 bushels of No. 1 wheat stored in Valleau's elevator, and on the 19th day of February, 1876, the Bank loaned to J. H. Baker $1,000, and took as security for its re-payment special bin receipts for 1,500 bushels of No. 1 wheat stored in Valleau's elevator; that the bins did not, at the time the receipts, were delivered, contain all the wheat described in the receipts but were afterwards (in pursuance of the promise and agreement of Valleau that they should be) filled with the amount called for; that Valleau, on the 6th day of May, 1876, called upon the cashier of the bank and represented to him, and led him to believe, that he was authorized to draw on the defendants for $10,000, and that the draft would be paid; that the cashier relied upon this representation, and, believing it to be true, received the drafts and surrendered to Valleau the warehouse receipts; that the transaction was fraudulent on the part of Valleau; that the bank and the plaintiffs did not receive from Valleau the checks read in evidence in actual payment of the notes of himself and Baker, relying on Valleau's responsibility, and did not surrender the notes and warehouse receipts on the faith of such responsibility; that the drafts drawn by Valleau on defendants were not paid; that Valleau shipped the wheat covered by the warehouse receipts to defendants; that such shipment was made by Valleau *with the intent to defraud the bank and the plaintiffs;* that all or the greater part of the wheat was shipped out of the elevator before the 6th day of May, 1876; that defendants received the wheat thus shipped by Valleau, sold it and applied the proceeds to the credit of Valleau's account with them; that the amount of the wheat received by defendants was 11,500 bushels; that neither the plaintiffs, nor the bank, nor either of them, verbally consented, prior to the 6th day of May, 1876, that the wheat covered by the warehouse receipts, or any part of it, should be shipped by Valleau; that the wheat covered by the receipts was, at or before its shipment, mixed with other

wheat in the elevator, but that such mixture was without the knowledge or consent of the plaintiffs, or the officers of the bank; that the mixture of the wheat covered by the warehouse receipts was intentional, and made by a person in charge of the elevator, and acting on behalf of Valleau; that defendants had no knowledge of the mixture; that the total amount of No. 1 wheat shipped from the elevator to and received by defendants subsequent to January 31, 1876, was 19,488 30-60 bushels, and the total amount shipped from the elevator to other parties than defendants during the same period was 7,622 40-60 bushels; that defendants, after January 31, 1876, made general advances of money to Valleau in the course of their business, on the credit of wheat shipped to them from his elevator in Decorah and at other places, and that the amount of the advances was equivalent to the value of the wheat so shipped; that defendants made no specific advances on shipments to them on any of the wheat covered by the receipts given to plaintiffs and the bank; that defendants made a final settlement with Valleau on the 26th day of September, 1876, *in which settlement Valleau was credited with the full value of all the wheat received from him, and was released from the balance of defendants' account against him;* that at the time of such settlement defendants knew of the pending of an action commenced by the bank in Winneshiek county, Iowa, against Valleau on the drafts; that *the defendants knew that the wheat received by them from Valleau's elevator in Decorah was covered by receipts held by the plaintiffs and the bank; that defendants, during the shipment of said wheat, had notice or knowledge of the fraud of Valleau, and that defendants were parties to the fraud;* that the plaintiffs and the bank had full knowledge that the defendants were parties to the fraud, on the 25th day of April, 1877; that the plaintiffs and officers of the bank first had knowledge that the wheat covered by the receipts had been shipped out of the elevator on or about the 15th day of May, 1876, and first had knowledge or information of the fact that the wheat, or any part of it, had been shipped to and received by defendants on or about the 15th day of May, 1876.

There were many other facts conceded, or not disputed, upon the trial, but which are not specifically found or disclosed in the special verdict.

Motion was made by plaintiffs for judgment on this verdict. The motion was filed December 7th, 1878. On the 11th day of December, 1878, a motion was made by defendants to set aside the verdict. The motions will be found on pages 12 and 13 of the printed case.

The parties, by stipulation, agreed upon the value of the wheat. On the 24th day of April, 1879, both the Circuit and District Judges being present, the Court directed judgment to be entered upon the special verdict of the jury, "*and facts conceded or not disputed upon the trial,*" in favor of the plaintiffs, for the sum of $12,554.89, and costs.

The defendants bring the case into this Court by writ of error. *There is no Bill of Exceptions, and no assignment of errors, as required by Section 997 of the Revised Statutes of the United States.*

Apparently this writ of error was sued out merely for delay. If this Honorable Court shall be of that opinion, we ask that the judgment be affirmed, with double costs, and damages for the delay, as provided by law. [Desty's Federal Procedure, Section 1010, page 215, and Rule 23, pages 261 and 262, of same book.]

It must be clear, from an inspection of the record, without a Bill of Exceptions showing what took place at the trial, that many facts which were conceded, or at least not disputed, and upon which the Judges acted in making their final decision, are not before this Honorable Court. And it must be manifest, from the findings of the jury, that the plaintiffs in error were parties to a fraud on the part of Valleau, and had conspired and combined with him to defraud the plaintiffs and the bank.

None of the evidence showing this conspiracy is before the Court. The special findings of the jury on the important questions at issue, are in the record. The record discloses not only an attempt on the part of Valleau to defraud the defend-

ants in error, but that the plaintiffs in error were active participators in the fraud, and themselves received and retained the fruits of the fraud.

For obvious reasons, the plaintiffs in error dared not to present to this Court the record containing the evidence of their fraud. Apparently they rely upon some very technical point on the face of the record to reverse the judgment, or else have taken out a writ of error merely for vexatious delay.

It is believed that there is no error on the face of the record. At all events, the error, if any, is of such a character that nothing short of an assignment of the error, as required by Section 997, will bring it to light.

## ARGUMENT.

There being no bill of exceptions, and no assignment of errors as required by Section 997 of the Revised Statutes, it is impossible to anticipate the points of error, if any, relied upon by the defendants to reverse the judgment.

A special verdict was taken at the request of the presiding judge. He propounded such questions to the jury as he deemed material to the issues. There were facts conceded, or not disputed, during the trial, which are not before this Court, but on which the Circuit Court acted in rendering its final judgment.

The record of this judgment recites, "and that the motion of the plaintiffs for judgment upon the special verdict of the jury, *and facts conceded or not disputed upon the trial*, be and hereby is granted." (Folio 31, page 14.)

This recital in the record is conclusive on the plaintiffs in error. If they, in good faith, desired a reversal of this judgment on the merits, they should have presented, by bill of exceptions, or in some form, a record showing that the "facts conceded or not disputed upon the trial," did not warrant or authorize the judgment.

The burden of establishing an error in the judgment is certainly upon the plaintiffs in error. They must show clearly

wherein and in what respect the judgment is erroneous. They do not show any error by merely bringing into Court the complaint, answer, stipulation of counsel, and special verdict, in a case where the judgment recites that the Court bases its decision not only on these papers but upon "facts conceded or not disputed upon the trial." What are the facts thus conceded? What are the facts not disputed? *The record is silent.* The plaintiffs in error ask the judgment to be reversed because the "conceded" facts, or facts not disputed, are not in the special verdict. The special verdict, they assert, is not specific enough.

The short answer to this pretense for reversal is that these facts need not appear in the special verdict.

The decisions of the Supreme Court of Wisconsin are so many, and so strong, clear and conclusive on this point, that they need only be cited and shortly quoted from.

It was quite the habit of some sharp lawyers, who prided themselves more upon their ability in that direction than on those qualities which make true and honest lawyers, to make all sorts of admissions in the trial Courts, insist that certain questions of fact were not and would not be disputed, and then call for a special verdict, as they had a right under the Wisconsin law to do, and when the special verdict was returned into Court, then move to set it aside on the ground that all of the material issues of fact were not found by the jury.

The attention of the Supreme Court was finally called to this practice, and the result was a series of decisions which entirely defeated this shrewd trickery, and taught the tricksters that special verdicts were not safe retreats in which to hide, or to cover up either trickery or fraud in the trial of a case.

The question as to whether it was necessary that a special verdict should find facts clearly established by the evidence, or not really contested at the trial, came up in the case of *McNarra vs. The Chicago & Northwestern Railroad Co.*, 41st Wis., 70. In that case the special verdict did not find an important fact, to-wit.: that in a suit to recover damages for injury to property

caused by negligence of defendant, that plaintiff was not guilty of negligence. Justice LYON says: "If the *undisputed evidence* settles the issue in favor of the prevailing party, the omission of the jury to pass upon it will not work a reversal of the case. It is obvious that the rule must be the same when an issue is made on a defense stated in the answer, and there is no testimony tending to prove such defense. Here there is really no evidence to prove negligence on the part of the plaintiff. Had the question been submitted to the jury, and had they found the existence of such negligence, it would have been the duty of the Court to set aside the finding. We conclude, therefore, that the omission of the jury to pass upon that issue is not error."

*McHugh vs. C. & N. W. R. Co.*, 41st Wis., 75, was a similar case. The jury did not pass on the question of the alleged contributory negligence of the plaintiff. The jury also failed to find the number of acres of land injured by the Company, or the aggregate amount of the injury. Justice LYON says: "These omissions would be fatal to the judgment, were it not for the rule that every reasonable presumption would be made in support of the judgment of a Court of competent jurisdiction. *Under that rule it must be presumed in the present case, (the evidence not having been preserved) that there was no evidence tending to show negligence on the part of the plaintiff, or that the uncontradicted evidence proved that he was not negligent, and that each averment of the complaint necessary to support the judgment, unless negatived by the verdict, was proved on the trial.*"

This case goes far enough to affirm the judgment in this cause, even if the judgment had not contained the recital it does.

In *Farrell vs. Drees*, 41st Wis., 186, Justice LYON says: "In the absence of a bill of exceptions this Court will presume, in support of the judgment of the Court below, *that all of the allegations contained in the pleadings and essential to the judgment were proved.*"

In *Williams vs. Porter*, 41st Wis., 430, there was a special verdict. It was an action of replevin for a span of horses. There was no express finding that defendant unlawfully detained the property. This was the objection taken to the verdict. It was held that a judgment on a special verdict will not be reversed for failure of the jury to find upon any of the issues, if the uncontradicted evidence proves the issue in favor of the prevailing party. "In the present case," says the Judge, "the defendant in his answer admits the taking of the property, and the undisputed evidence proves that it was duly demanded by the plaintiff, and delivery thereof refused before the action was commenced."

In *Ward vs. Busach*, 46 Wis., 408, Justice TAYLOR says: "It is held by this Court that if a special verdict does not find upon a question of fact not admitted by the pleadings, which it is necessary should be found in favor of the party for whom judgment is entered in order to sustain such judgment, such omission in the special verdict will not be error for which the judgment will be reversed, if it appears from the bill of exceptions that the uncontradicted evidence in the case establishes such fact in favor of the party for whom such judgment was entered."

In *Berg vs. Chicago, Mil. & St. P. R. R. Co.*, 50 Wis., 424, the rule is again laid down, and it is declared that "it must be deemed settled that it is unnecessary to submit a question of fact to the jury when the fact itself is established by undisputed evidence. When so established, the fact is as much a verity in the case as though it were admitted by the pleadings. It would be absurd to submit a question of fact to a jury when there is no question that a fact exists."

The rule, thus laid down and settled by the Supreme Court of the State of Wisconsin, seems just and reasonable. It prevents a species of fraud and trickery which an unscrupulous lawyer would not hesitate to adopt. This very case illustrates the value of the rule as laid down by the Supreme Court of Wisconsin. The great contest in the case was not what was

the value of the wheat. That value was, of course, clearly proven by the settlement made by plaintiffs in error with Valleau, on the 26th of September, 1876, and which settlement the jury found in answering the 27th question. The value of wheat was also stipulated by the parties. It was not a disputed or contested fact in the case. The contest was mainly the fraudulent shipment of the wheat, and the complicity of the defendants in that fraud. The "contest" was not who had a legal right to maintain the action. That fact was conceded. The real contest was, had Valleau wrongfully and tortiously shipped the wheat to plaintiffs in error, and did they wrongfully and tortiously or frauduiently sell it, and convert the proceeds to their own use? In order to settle these questions it took from the 13th day of November, 1878, until the 4th day of December, 1878, to bring out the facts and secure the verdict of the jury. Not a word or letter of all this mass of evidence disclosing or proving the fraud found by the jury is returned to this Honorable Court.

But there is a record here which this Court can and will notice. There is nothing showing, or tending to show, that plaintiffs in error wished or desired any other questions submitted to the jury. They took no exceptions, so far as the records show, to the questions that were submitted. They asked for no instructions; they took no exception to rulings at the trial or to the charge of the Judge. But after a full and fair trial on all of the important and material issues in the case, and after they had probably conceded the facts, or at least not disputed the facts at the trial, and when final judgment is passed against them, they remove the record to this Court, without bill of exception, or assignment of error, in the hope that the judgment may be reversed for some alleged technical defect in the special verdict, and which defect, if any, was doubtless waived on the trial or the fact conceded, or at least not disputed; and this they ask, notwithstaading the judgment itself recites that the same was rendered on "*the special verdict of the jury and facts conceded or not disputed upon the trial.*"

The presumption of law, upon the record as it is, must be in favor of the validity of the judgment. It must be presumed, in the absence of a showing to the contrary, that such facts were conceded, or not disputed at the trial, as to warrant the judgment. That presumption cannot be overthrown or the judgment set aside until the defendants in the suit and against whom the judgment is entered, shall show that no such facts were conceded, or were disputed at the trial. This can only be done by bringing before the Court by bill of exceptions just what took place at the trial. Until this is done it must be presumed that the lower Court has told the truth in its recital of facts; it must be presumed that facts not found by the jury were conceded, or at least not disputed on the trial, and justified the judgment which was finally rendered.

If this argument is sound, then it is manifest that the writ of error in this case was vexatiously sued out, and the judgment should be affirmed with the highest penalty for the delay which the law and the rules of the Court will permit.

The special verdict certainly finds that the plaintiffs in error were engaged in a conspiracy with W. H. Valleau to cheat and defraud the defendants in error and the bank. They are clearly convicted by the special verdict such conspirators; Their fraud—not to say crime—was so clearly proven that the jury were not at all in doubt. They are content, however, with being proved co-conspirators with Valleau in his effort to defraud. After verdict establishing their conspiracy and fraud, they remove the record to this Court, conceding the verdict right as to the finding of the fraud and the conversion of the property, not daring, apparently, to present to this Court the evidence establishing the fraud, and rely, apparently, upon nothing but the most technical points, if any, to reverse, and which points, if the whole truth was known, were without doubt either actually conceded, or at least not disputed at the trial, and by this kind of practice attempt to perpetrate, if possible, a much more aggravating fraud than the fraudulent sale of the property of

defendants in error and the conversion of the proceeds of the sale to their own use.

It is believed that there is no rule of law, and no mode of practice which can successfully work out such a result. The record which the plaintiffs in error have made for themselves does not acquit them. It shows no error on its face, and if the judgment is affirmed, with double costs and ten per cent. damages for the vexatious delay, it will doubtless be a lesson to them, and to others like them, that the way of the transgressor is hard.

II.

If this Honorable Court shall be of the opinion, notwithstanding the recital in the judgment, that it was rendered "on the special verdict of the jury and facts conceded or not disputed upon the trial," that there are facts which should have been found in the special verdict, then we respectfully submit that it is not necessary to order a trial *de novo on all of the issues made by the pleadings.* The only defect, if defect there is, in the special verdict, is that it does not find the formal facts to be that plaintiffs are the lawful owners of the cause of action of the bank, and the value of the wheat.

These facts were conceded at the trial, but they are not specifically found in the special verdict. Every other fact, save these two, necessary to support this judgment, is specially found in the special verdict.

The plaintiffs in error have had a full, fair and impartial hearing on all the controverted material issues of fact in the case. Why plaintiffs in error should be permitted a new trial on all of these same issues, because the defendants in error and the Court relied upon admissions and concessions made at the trial, and did not embody in the special verdict, is not apparent. This Court has the power to remand the cause, if remanded at all, to simply try the two formal issues of fact not found in the special verdict.

This has been done in cases where there was a single point open or not properly passed upon.

The best reasoned case on this point which has come under our observation, is that of *Lisbon vs. Lyman*, 49 N. H., 582. This opinion cites many cases in which the Courts have set aside verdicts so far only as to try a particular question or single fact.

The case has been followed in *Janvrin vs. Fogg*, 49 N. Hamp., 340, *Wood vs. Wood*, 52 *N. Hamp.*, 422, and *Wiggin vs. Smith*, 54 *N. Hamp.*, 213. The last case was ejectment. The main issues had been fully and fairly tried. On writ of error it was found that there was error in not properly submitting to the jury a single point, to-wit: the adverse possession of S. L. Wiggin for twenty years before 1859. For that error a new trial was granted of that question. "The verdict," says the Court, "is right in other respects, and, therefore, need not be set aside, but a new trial will be granted *on this one point:* whether between 1839 and 1859 Samuel L. Wiggin acquired the right to the premises in question by prescription. If the defendant so elect she can have *a new trial on that point*; otherwise judgment on the verdict."

The defendant in that case did not elect a new trial. Is it not fair to suppose that plaintiffs in error would never elect a new trial on the mere question of value of the wheat, after that value had been fixed by their settlement with Valleau, and by the stipulation of the attorneys filed in Court?

The reason why the plaintiffs in error should not have a new trial on all of the issues because of a formal defect in the verdict, is that they have once had their day in Court—they have been fully heard and the issue fairly tried, and by simply urging two or three technical formal defects in the verdict, they admit the justice and correctness of the balance of the special findings. They say by this record, in legal effect, that the plaintiffs in this suit have made out their case, and the verdict is right in every respect except these mere formal facts which are not in it.

Why, then, should the plaintiffs in error, because of neglect or failure to have their formal findings in the verdict, have a new trial on each and every fact that has been fully and fairly tested, and which they concede, by the record they bring into this Court, to be right? Certainly the defendants in error "have as clear a right to the verdict upon the questions that were rightly tried, as the defendant has to a new trial of the question that was wrongly tried; and when the defendant asks the Court to deprive the plaintiff of the ground fairly and legally won, and to put the plaintiff to another expensive, laborious and vexatious campaign to recover the same ground a second time, it is for defendant to show how such an extraordinary, unjust and unconscionable demand can be sustained. On the face of it such a demand is an appeal to despotic power—a power that would indulge itself in the needless and indiscriminate destruction of those parts of a costly verdict, in which there is no error—can be paralleled only by a power that would destroy an entire verdict without cause. If the whole of this verdict in this case were destroyed when nearly the whole of it is right, the plaintiff might be excused for reprehending a discretion stretched into arbitrary power, and calling for a restriction of it without reasonable limits."

In *Ware, administrator, &c., vs. Hylton, 3d Dallas, 199,* this Court sent its special mandate to the Circuit Court to enter a particular judgment, and to ascertain the damages that should be awarded the plaintiff in error.

H. M. FINCH,

*Of Counsel for Defendants in Error.*